(1) 061644 JUN 11 2007

No. 06-_____ OFFICE OF THE CLERK

In the
Supreme Court of the United States

MADELEINE DELONG,
PETITIONER

v.

BEST BUY COMPANY, INC.
RESPONDENT

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

DANIEL M. KLEIN
Counsel of Record
JOHN F. BEASLEY, JR.
BUCKLEY & KLEIN, LLP
1180 West Peachtree Street
Atlantic Center Plaza, Ste 1100
Atlanta, Georgia 30309
(404) 781-1100

Counsel for Petitioner
Madeleine DeLong

QUESTION PRESENTED

Under what circumstances can an employer be held liable for retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, based upon the bias of subordinate company officials, where the officials did not make the adverse employment decision but caused that decision through submission of false evidence?

LIST OF PARTIES

The parties to this action are set forth in the caption.

TABLE OF CONTENTS

Page

Question Presented i

List of Parties ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Basis for Jurisdiction 1

Statutes Involved 1

Statement of the Case 2

I. Factual Background 2

II. Decisions from the District Court 6

III. Decisions of the Eleventh Circuit 7

Reasons for Allowing the Writ 8

I. There Exists a Split Among the Circuits as to Subordinate Bias Liability 9

A. There Remains an Acknowledged Split Among the Circuits on the Application of Subordinate Bias Liability 10

TABLE OF CONTENTS - CONTINUED

Page

B. This Split Has Further Fractured Circuits on How Best to Interpret This Court's Opinions in *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742 (1998) and *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133 (2000)..... 14

C. The Eleventh Circuit Standard is in Conflict with the Fifth and Tenth/Seventh Circuits and, Like the Fourth Circuit Standard, Undermines Title VII's Broad Remedial Purpose..... 17

II. This Case Presents Another Opportunity to Resolve An Important Question of Federal Law 19

Conclusion 23

Appendix 1a

I. Opinion of the U.S. Court of Appeals for the Eleventh Circuit, filed December 13, 2006..... 1a

II. Opinion and Order of the U.S. District Court, Northern District of Georgia, Atlanta Division, filed March 7, 2006 ..... 8a

III. Order and Report and Recommendation of the U.S. Magistrate Judge for the U.S. District Court, Northern District of Georgia, Atlanta Division, filed December 13, 2005 ..... 9a

TABLE OF CONTENTS - CONTINUED

Page

IV. Order on Rehearing from the U.S. Court of Appeals for the Eleventh Circuit, filed March 17, 2007 ..... 58a

TABLE OF CITED AUTHORITIES

Page

CASES:

Abramson v. William Paterson Coll. of New Jersey, 260 F.3d 265 (3rd Cir.2001) 17

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 19

Bergene v. Salt River Project Agric. Improvement & Power Dist., 272 F.3d 1136 (9th Cir.2001) 18

Brochu v. City of Riviera Beach, 304 F.3d 1144 (11th Cir. 2002) 20

Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) 13, 14, 15, 16, 17

Burlington Northern and Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006) 20

E.E.O.C. v. BCI Coca-Cola Bottling Co. of Los Angeles, 450 F.3d 476 (10th Cir. 2006) ..... passim

Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344 (6th Cir.1998) 17

Griffin v. Washington Convention Ctr., 142 F.3d 1308 (D.C.Cir.1998) 17

Page

Hill v. Lockheed Martin Logistics Management, Inc., 354 F.3d 277 (4th Cir. 2004).....passim

Ledbetter v. Goodyear Tire & Rubber Co., Inc., No. 05-1074, 2007 WL 1528298 (U.S. May 29, 2007).....19

Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236 (11th Cir. 1998).....18

Lust v. Sealy, Inc., 383 F.3d 487 (7th Cir. 2004).....11, 12, 13

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000).....passim

Rose v. New York City Bd. of Educ., 257 F.3d 156 (2nd Cir. 2001).....17

Russell v. McKinney Hosp. Venture, 235 F.3d 219 (5th Cir. 2000).....11, 17

Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46 (1st Cir. 2000).....17

Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990).....9

Page

Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F.3d 1316 (8th Cir. 1994) 18

Sullivan v. Nat'l R.R. Passenger Corp., 170 F.3d 1056 (11th Cir. 1999) 21

Teamsters v. United States, 431 U.S. 324 (1977) 19

Wascura v. City of South Miami, 257 F.3d 1238 (11th Cir. 2001) 18

STATUTES:

42 U.S.C. § 2000e *et seq.* ..... passim

42 U.S.C. § 2000e(b) 1, 16

42 U.S.C. § 2000e-3(a) 2

OTHER AUTHORITIES:

BCI Coca-Cola Bottling Co. of Los Angeles v. E.E.O.C., No. 06-341, 2006 WL 2582502 (2006) 10

BCI Coca-Cola Bottling Co. of Los Angeles v. E.E.O.C., 127 S.Ct. 852 (2007) 10

Page

BCI Coca-Cola Bottling Co. of Los Angeles v. E.E.O.C., 127 S.Ct. 1931 (2007) 10, 20

Fables of La Fontaine 344 (Walter Thornbury trans., Chartwell Books) 9

OPINIONS BELOW

The December 13, 2006, opinion of the court of appeals, which is unpublished but unofficially reported at 211 Fed.Appx. 256, 2006 WL 3623697, is set out at pp. 1a-7a of the Appendix. The March 7, 2006, opinion and order of the district court granting summary judgment, which is not officially reported but is unofficially reported at 2006 WL 562195, is set out at 8a. The December 13, 2005, order and report and recommendation of the magistrate judge recommending summary judgment, which is not officially reported but which is also unofficially reported at 2006 WL 562195, is set out at 9a-57a. The March 12, 2007, order of the court of appeals denying Petitioner's motion for rehearing or, alternatively, rehearing *en banc*, which is not officially reported, is set out at pp. 58a-59a.

BASIS FOR JURISDICTION

The judgment of the court of appeals was entered on December 13, 2006. The order denying the petition for rehearing or, alternatively, petition for rehearing *en banc* was entered on March 12, 2007. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section701(b) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e(b), provides in pertinent part

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks

> in the current or preceding calendar year, and any agent of such a person . . . .

Section 704(a) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-3(a), provides in pertinent part

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

DeLong worked for Best Buy as General Manager of its Savannah, Georgia store. When she took over the store in March 2000, it was ranked in the bottom 50% of all Best Buy stores nationwide. By late 2002, her store was regularly ranked as the top store in the district and among the best stores throughout the entire company.[1]

---

[1] D47, DeLong Decl. at p.1. Pursuant to Supreme Court Rule 12.7, citations are to the district court record. District Court Docket No. 47 is DeLong's response to Best Buy's Motion for Summary Judgment, which includes a brief in opposition, DeLong's statement of material facts, a response to Best Buy's statement of undisputed material facts, two declarations, and deposition excerpts and other exhibits. Because "D47" consists of multiple documents without any clear numeric designations for its components, DeLong will attempt to describe the relevant document for each citation by name with page or exhibit number.

DeLong was the only female Store Manager in her district and perceived that she was being treated less favorably than the male General Managers. Her District Manager, Dean Wheatman, was demeaning and condescending to her in public, rarely spoke to her otherwise, and avoided visiting her store. Wheatman's discriminatory treatment culminated in an incident in which DeLong had reported a male subordinate manager for theft but Wheatman protected the male, disciplining DeLong instead.[2]

In October of 2002, DeLong submitted a formal complaint accusing Wheatman of sex discrimination. In her complaint, DeLong also accused District Human Resources Manager Janet Brown of tolerating the discriminatory treatment.[3]

In late November of 2002, Scott Crossler, a subordinate manager in DeLong's store, attempted to boost the store's monthly figures for accessory sales by ringing up some $1,500 in electronic accessories on the last day of the month. Crossler, who had credit problems and whose company charge account had been shut down, looked up DeLong's account when she was away from the store and charged the accessories to her account. DeLong knew nothing of Crossler's actions at the time. She only found out what he had done when she received her monthly charge statement. She wrote up a formal reprimand of Crossler and sent the reprimand to the district human resources office for inclusion in Crossler's personnel file. DeLong also reported Crossler's actions to Richard Wakefield, the store's Loss

---

[2] D47, DeLong Decl. at pp. 2-3, 6, Wakefield Decl. at p. 1.
[3] D47, DeLong Decl. at pp. 6-7.

Prevention Manager. Wakefield observed DeLong's anger at Crossler's behavior.[4]

In late May or early June of 2003, Crossler was accused of rape by a female co-worker and DeLong had Crossler terminated. Announcing his intention to "bring down" DeLong, Crossler then reported his November 2002 accessories purchase to Best Buy higher management, and falsely claimed he had purchased the accessories on DeLong's instructions.[5]

Brown, Wheatman, and District Loss Prevention Manager Brian Frantz were assigned to investigate Crossler's accusation.[6] So empowered, Brown manufactured evidence and used it to procure authorization to terminate DeLong. Specifically, Brown reported to Best Buy's Human Resources Manager, Diane Lemaux, that the team had interviewed Wakefield and that Wakefield had corroborated Crossler's charge.[7] This supposed interview was fictitious, for Wakefield was away on vacation during the investigation; moreover, the information Wakefield

---

[4] D47, DeLong Decl. at p. 8-9, Wakefield Decl. at p. 3 and D47, exhibit 9.

[5] D47, DeLong Decl. at p. 9..

[6] D56 at p. 19; D57 at pp. 32-33.

[7] Specifically, Brown stated in her deposition

> Richard Wakefield was -- Brian [Frantz], then spoke to Rich Wakefield, and he admitted that Madeleine had asked h[im] to return these products back to her car[d] because they were trying to win a banner, and they didn't. ... And then from there once we had all of the facts and the information, I partnered with Dianne Lemaux, the regional human resource manager, with the information that we had seeking confirmation and direction on what steps should be taken. D56 at p. 21.

possessed refuted, rather than corroborated, the charge.[8] Nevertheless, based on Brown's false "evidence," Lemaux authorized Brown to terminate DeLong.[9]

The day after DeLong was terminated, Wakefield returned from vacation and was interviewed by Frantz.[10] Wakefield explained to Frantz that it was DeLong who had revealed Crossler's actions to the other store managers—something that would have been foolish if the scheme had been her idea.[11] Frantz reported this exculpatory information to Brown and Wheatman, but they concealed it from Lemaux.[12]

On January 6, 2004, DeLong filed suit against Best Buy alleging, among other things, retaliatory termination of her employment in violation of Title VII of the Civil Rights Act of 1964.[13] During the course of discovery, evidence emerged strongly suggesting that Brown and Wheatman had destroyed a document that would have signaled DeLong's innocence of the charge for which they procured her termination. Specifically, when Best Buy produced Crossler's personnel file during the litigation, it was discovered that all of Crossler's disciplinary records were missing.[14] These disciplinary records would have included DeLong's written reprimand of Crossler for the accessories incident (of course, DeLong was not likely to have created a record of the event if it had been her idea).[15] Until it was turned over to Best Buy's attorneys, Crossler's personnel file had been kept in a locked file cabinet in Brown's office, and

---

[8] D47, Wakefield Decl. at p. 3; D57 at pp. 50-51.
[9] D57 at pp. 52-53.
[10] D47, Wakefield Decl. at p. 3.
[11] D47, Wakefield Decl. at 3; D57 at pp. 52-53.
[12] D57 at pp. 52-53.
[13] D1.
[14] D58 at pp. 68-70; D58, exhibit 33.
[15] D47, DeLong Decl. at p.8; Wakefield Decl. at p.3; D58 at p.70.

had been under the exclusive control of Brown and Wheatman.[16]

The crux of DeLong's retaliation claim was that Brown and Wheatman, resentful of DeLong's accusation of sex discrimination against them several months earlier, took advantage of Crossler's accusation and manufactured false evidence to procure authority to terminate DeLong.[17] Brown and Wheatman submitted three kinds of false evidence: *first*, they falsely represented that they had interviewed Wakefield and that he corroborated the charge against DeLong, when in fact they had not spoken to Wakefield;[18] *second*, they concealed Wakefield's exculpatory information when they finally did speak with him;[19] *third*, they sanitized Crossler's personnel file, destroying or discarding the written reprimand of Crossler by DeLong, which would also have shown DeLong to have been innocent.[20] Although Lemaux herself had no motive to retaliate against DeLong, and although she possessed the final authority to approve DeLong's termination, her decision was procured by the false information she received from Brown and Wheatman.[21]

II. DECISIONS FROM THE DISTRICT COURT

On December 13, 2005, a United States magistrate judge for the United States District Court for the Northern District of Georgia, Atlanta Division, issued an order and report and recommendation in which he recommended that

---

[16] D58 at pp. 62-65.
[17] D47 at pp. 5-11.
[18] D56 at pp. 30-32.
[19] D57 at pp. 52-53.
[20] D58 at pp. 62-66, 68-70; D47, DeLong Decl. at p.8; D47, Wakefield Decl. at p.3.
[21] D57 at pp. 52-53.

Best Buy's motion for summary judgment be granted in its entirety.[22] In addressing DeLong's claims of retaliation, the magistrate acknowledged that both Brown and Wheatmen had "influential roles" in the decision to terminate DeLong; nevertheless, he credited Best Buy's argument that it had a good faith belief that DeLong was involved in the Crossler scheme.[23]

On March 7, 2006, the district court adopted in full the magistrate judge's report and recommendation and granted Best Buy's motion for summary judgment.[24] On March 20, 2006, DeLong timely filed a notice of appeal.[25] The only issue on appeal was the issue of retaliation.[26]

III. DECISIONS OF THE ELEVENTH CIRCUIT

On December 13, 2006, in an extremely short opinion and without any recitation of the facts, the Eleventh Circuit issued an order affirming the district court's grant of summary judgment.[27] The basis for its decision was stated succinctly

> While DeLong alleged that the investigation leading to her termination was a sham, and that those who terminated her did not honestly believe she engaged in violations of company rules, the facts DeLong points to in support of this claim fail to establish that Best Buy's

---

[22] D60, also attached hereto at 9a-57a.
[23] D60 at pp. 41-42 (good faith belief) and pp. 54-55 (Brown and Wheatman influence).
[24] D70, also attached at Appendix 8a.
[25] D72.
[26] See Appendix at 2a.
[27] D79, also attached at Appendix 1a-7a.

> decision to terminate her was anything other than a decision based upon its belief that she had violated the company's policies. She has not established that Best Buy's proffered reason for terminating her was not its true reason. DeLong has not shown that Best Buy did not honestly believe, following an investigation into the allegations against her, that she had on two separate occasions engaged in activities that violated the store's policies.[28]

In reaching this conclusion, the court focused on Best Buy's "honest belief" and ignored entirely the influential role played by biased subordinates Brown and Wheatman.

Following the Eleventh Circuit's opinion, DeLong filed a timely petition for rehearing or, alternatively, for rehearing *en banc*. On March 12, 2007, that petition was denied.[29]

REASONS FOR ALLOWING THE WRIT

Delong respectfully urges this Court to grant her petition for writ of certiorari and review the Eleventh Circuit's decision because there remains a split among the circuits as to the proper standard for applying subordinate bias liability and that split has caused further confusion as to the proper interpretation of this Court's decisions on agency liability in employment discrimination cases. Moreover, the Eleventh Circuit's decision in this case gives credence to a strict standard, in conflict with most other circuits, that offers employers immunity whenever a biased subordinate was not the principal or actual decisionmaker. Delong submits that

---

[28] See Appendix 7a.
[29] See Appendix 58a-59a.

the decision of the Eleventh Circuit in her case was founded upon an improper standard inasmuch as the court of appeals focused on the actual decisionmakers in the case without accounting for the subordinate bias that caused her termination.

I. THERE EXISTS A SPLIT AMONG THE CIRCUITS ON THE APPLICATION OF SUBORDINATE BIAS LIABILITY

Seventeen years ago, in *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990), the Seventh Circuit first uttered the words "cat's paw" and began something of a "cat fight" over employer liability based upon the motivations of a biased subordinate. To be sure, whether they are using such illustrative icons as "cat's paw" or "rubber stamp," many circuit courts have acknowledged and embraced the concept of an employer's liability for the discriminatory acts of supervisory employees who may not be the nominal decision maker but who do control the outcome of the decision.[30]

---

[30] In *E.E.O.C. v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476 (10th Cir. 2006), *cert. dismissed*, 127 S.Ct. 1931 (2007), the Tenth Circuit explained the etymology as follows: "The 'cat's paw' doctrine derives its name from a fable, made famous by La Fontaine, in which a monkey convinces an unwitting cat to pull chestnuts from a hot fire. *See Fables of La Fontaine* 344 (Walter Thornbury trans., Chartwell Books 1984). As the cat scoops the chestnuts from the fire one by one, burning his paw in the process, the monkey eagerly gobbles them up, leaving none left for the cat. *Id.* Today the term 'cat's-paw' refers to 'one used by another to accomplish his purposes.' Webster's Third New International Dictionary Unabridged 354 (2002). In the employment discrimination context, 'cat's paw' refers to a situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action. . . The 'rubber stamp' doctrine has a more obvious etymology, and refers to a situation in which a decisionmaker gives perfunctory approval for an adverse employment action explicitly recommended by a biased subordinate." *Id.* at 484 (internal case citations omitted).

Indeed, lists of the cases establishing circuit precedent have found their way into recent decisions and at least one petition to this Court. *See e.g. Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277, 289 (4th Cir. 2004), *cert. dismissed*, 543 U.S. 1132 (2005)(citing cases); *E.E.O.C. v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 484-85 (10th Cir. 2006), *cert. dismissed*, 127 S.Ct. 1931 (2007)(citing cases)(hereafter "*BCI*"); and Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit in *BCI Coca-Cola Bottling Co. of Los Angeles v. E.E.O.C.*, No. 06-341, 2006 WL 2582502 ("*BCI* Petition")(citing cases). However, what all of these courts have not embraced and what has hewn them apart and created a split that deserves redress by this Court is the level of control a biased subordinate must exert over the ultimate adverse employment decision.

A. There Remains a Split Among the Circuit Courts of Appeal With Respect to Subordinate Bias Liability

On January 5, 2007, this Court granted certiorari in the *BCI* case. *See BCI Coca-Cola Bottling Co. of Los Angeles v. E.E.O.C.*, 127 S.Ct. 852 (2007). While the petition has been dismissed (*BCI Coca-Cola Bottling Co. of Los Angeles v. E.E.O.C.*, 127 S.Ct. 1931 (2007)), the question presented by the petitioner was almost identical to the question in the present petition: "under what circumstances is an employer liable under federal anti-discrimination laws based on a subordinate's discriminatory animus, where the person(s) who actually made the adverse employment decision admittedly harbored no discriminatory motive toward the impacted employee." *BCI* Petition at p. i. At the time that the petition was granted, there existed a decided split among the circuits as to the standard for

imputing corporate liability based upon subordinate bias. That split remains.

In *BCI*, the Tenth Circuit aptly described the divergence of opinions on the subject. These opinions are best represented by decisions from the Fourth, Fifth and Seventh Circuits, with the Tenth Circuit falling into the Seventh Circuit camp. *See Hill*, 354 F.3d at 291; *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000); *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004); *BCI*, 450 F.3d. at 487. As the Tenth Circuit explained, the most lenient approach to the question is taken by the Fifth Circuit. In the Fifth Circuit, liability for subordinate bias is predicated on a determination of whether the subordinate "'possessed leverage, or exerted influence, over the titular decisionmaker.'" *See BCI*, 450 F.3d at 486 (quoting *Russell*, 235 F.3d at 227). The Tenth Circuit further described this approach as contemplating that "any 'influence,' the reporting of any 'factual information,' or any form of 'other input' by a biased subordinate renders the employer liable so long as the subordinate 'may have affected' the employment action." *Id.* at 486.

The opposite extreme, according to the Tenth Circuit, is held by the Fourth Circuit and articulated in *Hill v. Lockheed Martin Logistics Management, Inc.*, *supra*. The standard in the Fourth Circuit is, indeed, much stricter:

> In sum, to survive summary judgment, an aggrieved employee who rests a discrimination claim under Title VII or the ADEA upon the discriminatory motivations of a subordinate employee must come forward with sufficient evidence that the subordinate employee possessed such authority as to be viewed as the one principally responsible for

> the decision or the actual decisionmaker for the employer.

Hill, 354 F.3d at 291. The Tenth Circuit rejected each of these approaches, adopting, instead, a middle ground approved by the Seventh Circuit in *Lust v. Sealy, Inc., supra*:

> We find ourselves in agreement with the Seventh Circuit, which has rejected the Fourth Circuit's approach as 'inconsistent with the normal analysis of causal issues in tort litigation.' To prevail on a subordinate bias claim, a plaintiff must establish more than mere 'influence' or 'input' in the decisionmaking process. Rather, the issue is whether the biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse employment action.

Id. at 487-88 (internal case citations omitted). In *Lust*, the Seventh Circuit responded to the Fourth:

> We are mindful that [the Fourth Circuit] holds that a subordinate's influence, even substantial influence, over the supervisor's decision is not enough to impute the discriminatory motives of the subordinate to the supervisor; the supervisor must be the subordinate's "cat's paw" for such imputation to be permitted. That is not the view of this court, even though the "cat's paw" formula apparently originated in our decision . . . and has been repeated in a number of our cases. . . . The formula was (obviously) not intended to be taken literally (Sealy employs no felines), and were it taken

> even semiliterally it would be inconsistent with the normal analysis of causal issues in tort litigation.

Lust, 383 F.3d at 584 (internal case citations omitted). Under the Seventh Circuit's approach, causation is the critical element. If the subordinate employee had sufficient influence to actually cause the adverse employment decision, it would not matter that he or she was not the true or "principal decision maker."

Clearly, there is a strong divide among the circuits as to the proper analytical framework for subordinate liability cases. There is the "substantial influence" approach taken by the Fifth Circuit, the "causation approach" articulated by the Seventh Circuit and adopted by the Tenth Circuit and, then there is the "actual" or "principal decisionmaker" standard approved in the Fourth Circuit and, as argued below, utilized by the Eleventh Circuit. Given this split and the likely divergent outcomes of subordinate liability cases, it would be appropriate for this Court to take up the question. In doing so, the Court would also have an opportunity to answer lingering questions over the Court's directives in *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742 (1998) and *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133 (2000).

B. The Split Has Further Fractured Circuits on How Best to Interpret This Court's Opinions in *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742 (1998) and *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133 (2000)

The split between the Circuits has created yet another anomaly -- a difference of opinion on what direction this Court has given in construing employer liability under agency theories. This difference is apparent in the nearly polar-opposite opinions in *BCI* and *Hill.* In *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742 (1998) this Court observed that "Congress directed federal courts to interpret Title VII based on agency principles." *Id.* at 754. In explaining what this may mean in the employment context, the Court held that:

> Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.
>
> * * *
>
> For these reasons, a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer. Whatever the exact contours of the aided in the agency relation standard, its requirements will always be met when a supervisor takes a tangible employment action against a subordinate. In that instance, it would be

> implausible to interpret agency principles to allow an employer to escape liability.

Ellerth, 524 U.S. at 762-763. As evidenced by the decision in *Hill*, the Fourth Circuit has taken this to mean that liability for the acts of an agent requires the imprimatur of "supervisor" at best and "decisionmaker" at minimum. This requirement is apparent from its comparison of the language in *Ellerth* with the Court's later decision in *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133 (2000). Specifically, the Fourth Circuit holds up *Reeves* as demanding that a plaintiff prove that the person harboring discriminatory animus be the one "principally responsible" for the adverse action. *Hill*, 354 F.3d at 288 (citing *Reeves,* 530 U.S. at 151). The Fourth Circuit makes the comparison stating that *Reeves'*

> clear emphasis upon who holds "actual decisionmaking" power and authority or who has "principal responsibility" for an employment decision is consistent with the limitations set forth in *Ellerth.* Such individuals, although perhaps not acting as formal decisionmakers, nonetheless act in a supervisory or managerial capacity as the agents of the employer. It is these individuals who must possess the requisite discriminatory motivation behind the adverse employment decision that they make or for which they hold principal responsibility.

Id. at 289. The Fourth Circuit then goes on to refuse any

> construction of the discrimination statutes that would allow a biased subordinate who has no supervisory or disciplinary authority and who

> does not make the final or formal employment decision to become a decisionmaker simply because he had a substantial influence on the ultimate decision or because he has played a role, even a significant one, in the adverse employment decision.

Id. at 291. In sum, the Fourth Circuit interprets this Court's rulings in *Ellerth* and *Reeves* to define the outermost contours of subordinate bias liability. The Tenth Circuit flatly rejects such a narrow reading.

In *BCI*, the Tenth Circuit found that the "Fourth Circuit's strict approach makes too much of the phrase 'actual decisionmaker' in *Reeves*." *BCI*, 450 F.3d at 487. According to the Tenth Circuit, this Court "was describing what the petitioner's evidence showed, not prescribing the 'outer contours' of liability." *Id.* (citing *Reeves,* 530 U.S. at 151-52 and pointing out that the phrases "actual decisionmaker" and "principally responsible" appear only in Part III.B, which begins, "Applying this standard here ...")). Contrary to the Fourth Circuit, the Tenth Circuit sees *Reeves* and *Ellerth* as casting a much broader net. Citing to *Ellerth*, The Tenth Circuit explains that Title VII imposes liability for discrimination by employers and their agents. *Id.* (citing 42 U.S.C. § 2000e(b)). According to the Tenth Circuit's interpretation, this "includes not only 'decisionmakers' but other agents whose actions, aided by the agency relation, cause injury." *Id.* (citing *Ellerth,* 524 U.S. at 760). To conclude otherwise, would "allow employers to escape liability even when a subordinate's discrimination is the sole cause of an adverse employment action, on the theory that the subordinate did not exercise complete control over the decisionmaker." *Id.*

As is apparent from the difference of opinion between the Fourth and Tenth Circuits, the circuit split as to subordinate liability has bled over into a dispute over just what this Court meant when it applied the phrase "aided by agency" from the Restatement (Second) of Agency (1957) to the employment context. Granting Delong's petition will provide an opportunity for the Court to clarify its opinions in *Ellerth* and *Reeves* and resolve this dispute.

C. The Eleventh Circuit Standard is in Conflict with the Fifth and Tenth/Seventh Circuits and, Like the Fourth Circuit Standard, Undermines Title VII's Broad Remedial Purpose

The dissent in *Hill* points out that most circuits have adhered to a more lenient standard than even the Tenth Circuit but most certainly a standard more forgiving than that of the Fourth Circuit. *Hill*, 354 F.3d at 303.[31] The Eleventh

---

[31] *Id.* (citing *Griffin v. Washington Convention Ctr.*, 142 F.3d 1308, 1312 (D.C.Cir.1998) ("[E]vidence of a subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence."); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir.2000) ("One method [of proving pretext] is to show that discriminatory comments were made by ... those in a position to influence the decisionmaker."); *Rose v. New York City Bd. of Educ.*, 257 F.3d 156, 162 (2d Cir.2001) (discriminatory comments of plaintiff's supervisor, who did not have formal firing authority but who "had enormous influence in the decisionmaking process," constitute direct evidence of discrimination); *Abramson v. William Paterson Coll. of New Jersey*, 260 F.3d 265, 286 (3d Cir.2001) (internal quotations and citation omitted) ("Under our case law, it is sufficient if those exhibiting discriminatory animus influenced or participated in the decision to terminate ... [because] an evaluation at any level, if based on discrimination, [may] influence[ ] the decisionmaking process and thus allow [ ] discrimination to infect the ultimate decision."); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 226 (5th Cir.2000) ("If the [plaintiff] can demonstrate that others had influence or leverage over the official decisionmaker ... it is proper to impute their discriminatory attitudes to the formal decisionmaker."); *Ercegovich v. Goodyear Tire &*

Circuit, however, has adopted an approach that more closely resembles that of the Fourth Circuit and, arguably, is an even stricter standard. In that regard, it is in direct conflict with the majority of other circuits.

In *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236 (11th Cir. 1998), *reh'g denied*, 178 F.3d 1305, *cert. denied*, 528 U.S. 930 (1999), the Eleventh Circuit interpreted the cat's paw line of cases to encompass only those cases where the employee harboring discriminatory animus "*is* the decisionmaker, and the titular 'decisionmaker' is a mere conduit for [that employee's] discriminatory animus." *Id.* at 1249 (emphasis in original); *see also Wascura v. City of South Miami*, 257 F.3d 1238, 1247 (11th Cir. 2001)(requiring that the subordinate be a "dominant decision-maker whose decision was rubber-stamped by others"). This interpretation is in direct conflict with the Fifth Circuit's "substantial influence" approach and far removed from the Tenth Circuit's "causation" approach. Moreover, if courts are at least required to give lip-service to the notion that Congress intended Title VII to provide "robust protection against workplace discrimination," then the Eleventh and Fourth Circuit's conflict with other circuits and apparent departure

---

Rubber Co., 154 F.3d 344, 354 (6th Cir.1998) ("[R]emarks by those who did not independently have the authority ... to fire the plaintiff, but who nevertheless played a meaningful role in the decision to terminate the plaintiff, [are] relevant."); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1323 (8th Cir.1994) (internal quotation marks omitted) (discriminatory remarks of a manager, who was the fired plaintiff's supervisor and who was "closely involved in employment decisions," constitute direct evidence of discrimination); *Bergene v. Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d 1136, 1141 (9th Cir.2001) (manager's comment was direct evidence of retaliation because "[e]ven if [the] manager was not the ultimate decisionmaker [in denying the plaintiff a promotion], that manager's retaliatory motive may be imputed to the company if the manager was involved in the ... decision")).

from the trend toward a more lenient standard could seriously undermine that intent. *See Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, No. 05-1074, 2007 WL 1528298, at *23 (U.S. May 29, 2007)(Ginsburg, J., dissenting)(citing *Teamsters v. United States,* 431 U.S. 324, 348 (1977)("The primary purpose of Title VII was to assure equality of employment opportunities and to eliminate ... discriminatory practices and devices...." (internal quotation marks omitted)); *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 418 (1975) ("It is ... the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination.")).

In the present case, the Eleventh Circuit focused its attention entirely on Best Buy's good faith belief as to the nature of DeLong's infractions. Although in line with circuit precedent, this focus was a departure from and in direct conflict with the weight of authority in other circuits and had the effect of improperly and unfairly shielding the company from liability. Moreover, this focus fails to recognize the plain fact that "many companies separate the decision making function from the investigation and reporting functions, and that [discriminatory] bias can taint any of those functions." *BCI*, 450 F.3d at 488. Because there is evidence that discriminatory bias tainted the investigatory function here and the Eleventh Circuit's decision, while in accord with the Fourth Circuit, is in conflict with practically all other circuits, DeLong is asking that the Court exercise its powers of review and grant her petition.

II. THIS CASE PRESENTS ANOTHER OPPORTUNITY TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL LAW

The petition for certiorari that was granted in *BCI* was dismissed on April 12, 2007. *See BCI Coca-Cola*

Bottling Co. of Los Angeles v. E.E.O.C., 127 S.Ct. 1931 (2007). As a result, this Court lost the opportunity to resolve an important split in the circuits over the issue of subordinate bias and the contours of the "aided by agency relation" principle. With this petition, the Court has that opportunity once again. Furthermore, DeLong submits that the facts of her case make it all the more appropriate that the petition be granted. This is because her case, underscored by the submission of false evidence to the final decisionmaker by an investigator who had a motive to retaliate, highlights the unjust result that can come from a standard that is as inflexible as that of the Fourth and Eleventh Circuits.

In deciding DeLong's case, the Eleventh Circuit first outlined the elements of a prima facie case of retaliation under Title VII: "'a plaintiff must show that (1) [she] engaged in...statutorily protected expression; (2) [she] suffered an adverse employment action; and (3) there is a causal connection between the two events.'" See Appendix p. 3a, 4a (quoting *Brochu v. City of Riviera Beach*, 304 F.3d 1144, 1155 (11th Cir. 2002) (citations and internal quotation marks omitted)).[32] The court assumed for purposes of its opinion that DeLong established a sufficient causal connection to take the case to the next level – a burden shift "to the defendant to rebut the presumption of retaliation by

[32] In a footnote, the court recognized that "adverse employment action" is no longer the appropriate standard in light of the Supreme Court's decision in *Burlington Northern and Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006). Instead, Title VII plaintiffs must now "show that a reasonable employee would have found the challenged [retaliatory] action materially adverse" such that the action "might well have dissuaded a reasonable worker from" engaging in the statutorily protected activity. *Id.* As a result, actionable retaliation need not be "related to employment" and need not "occur at the workplace." *Id.* The court recognized that this element of the prima facie case is not at issue here (termination is certainly materially adverse under anyone's definition).

producing legitimate reasons for the adverse employment action." Appendix at p. 4a (citing *Sullivan v. Nat'l R.R. Passenger Corp.*, 170 F.3d 1056, 1059 (11th Cir. 1999) (citations and internal quotation marks omitted)). The court apparently based this assumption on the temporal proximity between the protected conduct and the adverse action.

At the next level, '[i]f the defendant offers legitimate reasons, the presumption of retaliation disappears,' and "[t]he plaintiff must then show that the employer's proffered reasons for taking the adverse action were actually a pretext for prohibited retaliatory conduct." *Id.* To show pretext, the plaintiff must prove, by a preponderance of the evidence, that the legitimate reasons offered by the employer for taking the adverse action were not its true reasons. Appendix at p. 4a, 5a (citing *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. at 143).

Here, the Eleventh Circuit found that DeLong had failed to show pretext because she had not controverted the legitimate reasons offered by Best Buy; namely, that it honestly believed DeLong had committed a second rule infraction. In so doing, the Eleventh Circuit further advanced its position, consistent with the Fourth Circuit and in conflict with most other circuits, that it is what the principal decisionmaker knows that is important. By holding to such a standard, the court of appeals highlights a further injustice: if by chance the *prima facie* case is proved, an employee will inevitably lose to the "honest belief" defense.

In *BCI*, the Tenth Circuit recognized that a reality of the workplace is that

> [a] biased low-level supervisor with no disciplinary authority might effectuate the termination of an employee from a protected

> class by recommending discharge or by selectively reporting or even fabricating information in communications with the formal decisionmaker.

Id., 450 F.3d at 486. This is just the circumstance here. A biased company official, charged with investigating DeLong's claims of discrimination, claims against herself no less, also investigated allegations of wrongdoing by DeLong and reported false information to the person charged with deciding DeLong's discipline. Clearly, the information was used by the decisionmaker, Lemaux, to authorize the termination of DeLong's employment. Best Buy was thus given the opportunity for absolution through claims of ignorance.

Not surprisingly and consistent with the strict "principal decisionmaker" standard, the Eleventh Circuit focused attention entirely on the company decisionmaker and her "honest belief" rather than the biased subordinate, casting a blind eye on the source of the information that DeLong had committed a second infraction. While this focus may withstand scrutiny under Eleventh and Fourth Circuit precedent, it is in direct conflict with decisions of most other circuits. In *BCI*, the Tenth Circuit explained that a proper recognition of subordinate bias claims can foreclose the strategic option of willful blindness to the source of reports and recommendations. *Id.* The rule adhered to by the Eleventh and Fourth Circuits opens the door to this option and necessarily prevents any employee from proving pretext in the face of the "honest belief" defense.

DeLong's petition asks that this Court use her case as the vehicle for taking up this question and settling the dispute among the circuits through the articulation of a reasonable standard for subordinate bias claims – one that

both recognizes the reality of workplace dynamics and advances the purposes of Title VII.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

Daniel M. Klein
Counsel of Record
John F. Beasley, Jr.
BUCKLEY & KLEIN, LLP
1180 West Peachtree Street
Suite 1100
Atlanta, Georgia 30309
Telephone: (404) 781-1100

Counsel for Petitioner
Madeleine DeLong

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 06-11853
Non-Argument Calendar

D.C. Docket No. 04-00025-CV-TWT-1

MADELEINE DELONG,

Plaintiff-Appellant,

versus

BEST BUY COMPANY INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

Filed U.S. Court of Appeals, Eleventh Circuit
December 13, 2006 – Thomas Kahn, Clerk

Before ANDERSON, BLACK and BARKETT, Circuit Judges.

PER CURIAM:

Madeleine DeLong appeals the district court's grant of defendant Best Buy's motion for summary judgment as to her complaint alleging retaliation, raised pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). DeLong argues that the district court erred in granting Best Buy's motion for summary judgment because the evidence established a causal connection between the protected activity in which she engaged and the adverse employment action taken against her, her termination. She also argues that Best Buy's proffered reasons for terminating her were not legitimate and were merely pretext for retaliating against her after she complained of her supervisor's sexual discrimination.[33] Upon review of the record and upon consideration of the parties' briefs, we find no reversible error and, accordingly, affirm the judgment of the district court.

I.

We review a district court's grant of summary judgment de novo, viewing the evidence in favor of the non-moving party. Fisher v. State Mut. Ins. Co., 290 F.3d 1256, 1259-60 (11th Cir. 2002). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of

---

[33] DeLong also raised, unsuccessfully, a claim of sex discrimination before the district court, but does not raise this as an issue on appeal. (R1-1 ¶ 25; see Blue Brief at 1). Accordingly, any claim in this respect is deemed waived, Flanigan's Enterprises, Inc. of Georgia v. Fulton County, Georgia, 242 F.3d 976, 987 (11th Cir. 2001), and matters relating to it will only be referred to herein to the extent they are relevant to DeLong's retaliation claim.

law." Fed.R.Civ.P. 56(c). A party opposing a properly submitted motion for summary judgment may not rest upon mere allegations or denials of her pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

II.

Title VII makes it unlawful for an employer to discriminate against an employee in retaliation for opposing a practice made an unlawful employment practice under Title VII. 42 U.S.C. § 2000e-3(a). "To recover for retaliation, the plaintiff need not prove the underlying claim of discrimination which led to her protest, so long as she had a reasonable good faith belief that the discrimination existed." Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 586 (11th Cir. 2000) (citations and internal marks omitted). To establish a prima facie case of retaliation under Title VII, "a plaintiff must show that (1) [she] engaged in...statutorily protected expression; (2) [she] suffered an adverse employment action;[34] and (3) there is a causal connection

---

[34] At the time the district court ruled on Best Buy's summary-judgment motion, the law in this Circuit required the plaintiff to demonstrate, as part of her prima facie case, that she suffered an "adverse employment action." That is no longer the appropriate standard in light of the Supreme Court's decision in Burlington Northern and Santa Fe Ry. Co. v. White, ____ U.S. ____, 126 S. Ct. 2405 (2006). Rather than demonstrate an adverse employment action, Title VII plaintiffs must now "show that a reasonable employee would have found the challenged [retaliatory] action materially adverse" such that the action "might well have dissuaded a reasonable worker from" engaging in the statutorily protected activity. Id. at ____, 126 S. Ct. at 2415. As a result, actionable retaliation need not be "related to employment" and need not "occur at the workplace." Id. at ____, 126 S.Ct at 2409. This case does not turn on that element of the prima facie case, thus we need not apply the Burlington Northern standard.

between the two events." Brochu v. City of Riviera Beach, 304 F.3d 1144, 1155 (11th Cir. 2002) (citations and internal quotation marks omitted).

"To establish a causal connection, a plaintiff must show that the decision-maker[s] [were] aware of the protected conduct, and that the protected activity and the adverse action were not wholly unrelated." Gupta, 212 F.3d at 590 (citations and internal marks omitted). To satisfy this showing, a plaintiff must generally establish "that the decisionmaker was aware of the protected conduct at the time of the adverse employment action." Brungart v. BellSouth Telecomms., Inc., 231 F.3d 791, 799 (11th Cir. 2000). Typically, to establish causation, the temporal proximity between the protected activity and the adverse action must be very close. Higdon v. Jackson, 393 F.3d 1211, 1220 (11th Cir. 2004). Consequently, where there is no other evidence from which a reasonable juror could infer causation, a retaliation claim fails as a matter of law when there is a substantial delay between the protected activity and the adverse action. Id. at 1220.

Once the plaintiff makes out a prima facie case, the "burden shifts to the defendant to rebut the presumption of retaliation by producing legitimate reasons for the adverse employment action." Sullivan v. Nat'l R.R. Passenger Corp., 170 F.3d 1056, 1059 (11th Cir. 1999) (citations and internal quotation marks omitted). "If the defendant offers legitimate reasons, the presumption of retaliation disappears," and "[t]he plaintiff must then show that the employer's proffered reasons for taking the adverse action were actually a pretext for prohibited retaliatory conduct." Id. The plaintiff must prove by a preponderance of the evidence that the legitimate

reasons offered by the employer for taking the adverse action were not its true reasons. See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143, 120 S.Ct. 2097, 2106 (2000).

III.

Prima Facie Case: Causal Connection

DeLong argues on appeal that the evidence she adduced in the district court establishes a causal connection between Best Buy's knowledge of the statutorily protected activity in which she engaged (her October 25, 2002 telephone call to Best Buy's "Open Line" complaining that her supervisor, Dean Wheatman, had sexually discriminated against her) and the retaliatory action she suffered (her June 26, 2003 termination). We note the temporal proximity between these two events-some eight months-is not "very close." See Clark County School District v. Breeden, 532 U.S. 268, 273, 121 S.Ct. 1508, 1511 (2001) (observing that "[t]he cases that accept mere temporal proximity between an employer's knowledge of the protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close'"). Nevertheless, pretermitting the question whether DeLong presented any other evidence beyond temporal proximity to show that her termination was causally connected to her "Open Line" complaint, we will assume, for the sake of argument, that DeLong can make out a prima facie case of retaliation. We need not decide that issue because we conclude that she has failed to produce evidence from which a reasonable juror could find that Best Buy's proffered reason for terminating her employment was pretext for retaliation.

Pretext

Best Buy argues that it terminated DeLong because she violated company rules twice in less than a year by participating in a scheme with her co-workers to "inboard" merchandise at the location where she worked.[35] DeLong argues that she had nothing to do with the "inboarding," that she did not instruct her subordinates to engage in the practice, and that Best Buy's belief that she did in fact participate in the scheme was mere pretext for its decision to terminate her in retaliation for calling the "Open Line" to complain of Wheatman's alleged discrimination. As support for her argument, DeLong states that the investigation leading up to her termination was a "sham," and that the other evidence in the record, when taken as a whole, demonstrates she was fired not for violating company rules, but as retaliation for engaging in protective activity.

"A reason is not pretext for discrimination 'unless it is shown both that the reason was false, and that discrimination was the real reason.'" Brooks v. County Com'n of Jefferson County, Ala., 446 F.3d 1160, 1163 (11th Cir. 2006)(alteration in original) (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515, 113 S.Ct. 2742, 2752 (1993)). To create a genuine issue of material fact on the question of pretext, DeLong must "demonstrate that the proffered reason was not the true reason for the employment decision." Jackson v. Ala. State Tenure Comm., 405 F.3d 1276, 1289 (11th Cir. 2005). She may do that "either directly by

---

[35] According to DeLong: "Inboarding involves exchanging a defective item that has been returned to a store and, while so doing, manipulating the internal pricing so that (a) the customer receives back both a replacement item and additional accessories and (b) the employee handling the transaction gets credit for 'selling' the additional accessories."

persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Id. We believe that she has done neither.

While DeLong alleged that the investigation leading to her termination was a sham, and that those who terminated her did not honestly believe she engaged in violations of company rules, the facts DeLong points to in support of this claim fail to establish that Best Buy's decision to terminate her was anything other than a decision based uon its belief that she had violated the company's policies. She has not established that Best Buy's proffered reason for terminating her was not its true reason. DeLong has not shown that Best Buy did not honestly believe, following an investigation into the allegations against her, that she had on two separate occasions engaged in activities that violated the store's policies. Accordingly, she has not created a genuine issue of fact on the question whether Best Buy's proffered reason was a pretext for retaliation. See St. Mary's Honor Ctr., 509 U.S. at 515, 113 S.Ct. at 2752; see also Pollard v. Rea Magnet Wire Co., 824 F.2d 557, 559 (7th Cir. 1987) ("A reason honestly described but poorly founded is not a pretext, as that term is used in the law of discrimination").

Because DeLong has not demonstrated that Best Buy's proffered non-discriminatory reasons for terminating her were pretext for retaliation, the judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MADELEINE DELONG, Plaintiff, v. BEST BUY COMPANY, INC., Defendant.	CIVIL ACTION FILE NO. 1:04-cv-25-TWT

OPINION AND ORDER

This is an employment discrimination action. It is before the Court on the Report and Recommendation [Doc. 60] of the Magistrate Judge recommending granting the Defendant's Motion for Summary Judgment [Doc. 40]. The Plaintiff has not produced any evidence that the Defendant's legitimate non-discriminatory reasons for terminating her were a pretext for sex discrimination or retaliation. The Plaintiff was terminated after multiple violations of company policy. After careful consideration of the Plaintiff's Objections, the Court approves and adopts the Report and Recommendation as the judgment of the Court.

SO ORDERED, this 7 day of March, 2006.

/s/Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MADELEINE DELONG,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION NO.
	:	1:04-CV-0025-TWT-CCH
BEST BUY COMPANY,	:	
	:	
INC.,	:	
	:	
Defendant.	:	

ORDER

Attached is the report and recommendation of the United States Magistrate Judge in this action in accordance with 28 U.S.C. § 636(b)(1) and this Court's Civil Local Rule 72.

Pursuant to 28 U.S.C. § 636(b)(1), each party may file written objections, if any, to the report and recommendation within ten (10) days of service of this Order. Should objections be filed, they shall specify with particularity the alleged error or errors made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the District Court. If no objections are filed, the report and recommendation may be adopted as the opinion and order of

the District Court and any appellate review of factual findings will be limited to a plain error review. United States v. Slay, 714 F.2d 1093 (11th Cir. 1983).

The Clerk is directed to submit the report and recommendation with objections, if any, to the district court after expiration of the above time period.

IT IS SO ORDERED this 13th day of December, 2005.

/s/C. Christopher Hagy
C.CHRISTOPHER HAGY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MADELEINE DELONG,	:	CIVIL ACTION NO.
	:	1:04-CV-0025-TWT-CCH
Plaintiff,	:	
	:	
v.	:	
	:	
BEST BUY COMPANY, INC.,	:	**:REPORT AND :RECOMMENDATION IN :AN EMPLOYMENT :DISCRIMINATION**
Defendant.	:	**:ACTION**

Plaintiff filed the above-styled civil action on January 6, 2004. She claims that Defendant discriminated against her on the basis of her sex and retaliated against her, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e, et seq.

The action is presently before the Court on Defendant's Motion for Summary Judgment [40]. For the reasons discussed below, the undersigned **RECOMMENDS** that Defendant's Motion be **GRANTED** and that Plaintiff's Title VII claims be **DISMISSED.**

I. BACKGROUND FACTS

Unless otherwise indicated, the Court draws the undisputed facts from Defendant's "Statement of Material Facts as to which There is No Genuine Issue to be Tried"

("SMF"). If, however, Plaintiff has disputed a specific fact and pointed to evidence in the record supporting her version of events, the Court has viewed all evidence and factual inferences in the light most favorable to Plaintiff, as required on a defendant's motion for summary judgment. Matsushita Elec. Indus. Co. v. Zenith Radio Crop., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L. Ed.2d 538 (1986); McCabe v. Sharrett, 12 F.3d 1558, 1560 (11th Cir. 1994); Reynolds v. Bridgestone/Firestone, Inc., 989 F.2d 465, 469 (11th Cir. 1993). Accordingly, the following facts are either not disputed or are viewed in the light most favorable to Plaintiff.

Plaintiff began her employment with Defendant Best Buy Company, Inc. ("Best Buy") on June 6, 1999, as a General Manager in Training in the company's Savannah Store, which is located in District 35. Dean Wheatman, the District Manager for District 35, and Karen Simmons, the District Human Resources Manager for District 35, interviewed Plaintiff for the position. As the title indicates, Plaintiff as a General Manager in Training, was training to become a General Manager of the Savannah store where she worked. Plaintiff became the General Manager of that store within approximately six months to one year after she was hired.

On August 20, 2002, Plaintiff was placed on a sixty-day corrective action plan. SMF ¶ 4; Ex. A to Defendant's Motion for Summary Judgment. The memorandum[36] addressing this corrective action states that it was issued "as

---

[36] The memorandum is titled a "30-Day Action Plan," but states in its body that it is a "60 day written warning action plan." There is no evidence that there is any substantial difference between a sixty-day and a thirty-day action plan.

a direct result of multiple open lines received regarding the negative working environment" at Plaintiff's store. Ex. A to Defendant's Motion for Summary Judgment.[37] The perceived negative environment was attributed to: Plaintiff's failure to provide "consistent leadership;" her remaining "disconnected" from her team; her needing "external intervention from the District Staff and from HR," and store performance that was below expectations. Ex. A to Defendant's Motion for Summary Judgment. Dean Wheatman, the District Manager, signed the form; Plaintiff herself signed the corrective action form on August 20, 2002. Id. The form warned Plaintiff that a failure to improve her performance would result in further action, up to and including termination of her employment. Id.

Plaintiff does not dispute that she received the corrective action form or that she was placed on a corrective action plan. Despite this review, however, she states that she was an "outstanding" manager, whose subordinates found her "very demanding but fair and hardworking," and that she developed "excellent relationship with the managers in her store." Plaintiff's Response to Defendant's SMF ("PRSMF") ¶ 3; Declaration of Rich Wakefield, Ex. 2 to Plaintiff's Responses to Defendant's Motion for Summary Judgment [47] ("Pl.'s Br.") ("Wakefield Aff.") ¶ 3; Declaration of Madeleine DeLong ("Delong Aff."), Ex. 1 to Pl.'s Br. ¶ 5. Plaintiff alleges that she did not have any problems in her store until Jason Denny and Scott Crossler were hired as assistant managers there. PRSMF ¶ 3. According to Plaintiff, Crossler and Denny were poor assistant managers who created morale problems for the store, and, although she

---

[37] An "open line" refers to an "open line complaint," which is a complaint made by an employee to the company's "open line" telephonic employee complaint system.

attempted to discipline them, they were drinking buddies with District Manager Dean Wheatman, who "protected" them from discipline. PRSMF ¶ 3. Plaintiff further alleges that the "open line" complaints about her store were "overwhelmingly" in regard to Denny and Crossler, although she cites no specific examples. PRSMF ¶ 3; Wakefield Aff. ¶ 8; DeLong Aff. ¶ 13. Plaintiff alleges that the corrective action plan falsely blamed her for problems "caused by Wheatman's drinking buddies," Denny and Crossler. PRSMF ¶ 3; Wakefield Aff. ¶ 8; DeLong Aff. ¶ 13.

In October of 2002, two months after Plaintiff was placed on the corrective action plan, Jason Denny was found to be "inboarding,"[38] which essentially involved selling

---

[38] Mark Aguto, the District Loss Prevention Manager, described inboarding in his deposition as follows: "You can reduce the price of a product in order to sell accessories and service plans so that the price comes out equal. In this case, what was happening was returns were being done for full amounts instead of like technology, and that entire amount was being used to resell the new product which is normally at a cheaper rate because of technology, prices drop, and then adding back on service plans and accessories, therefore, inflating your numbers." Deposition of Mark Arguto ("Arguto Dep."), attached as Ex. 6 to Pl.'s Br. and as Docket Entry [59] at 14-15.

Plaintiff defines the term and gives an example of inboarding in her Affidavit: "exchanging a defective item that has been returned to a store and, while so doing, manipulating the internal pricing so that (a) the customer receives back both a replacement item and additional accessories and (b) the employee handling the transaction gets credit for 'selling' the additional accessories. For example, a customer would come to the store with a defective digital camera that the customer had purchased several months earlier for $500. Under the company's 'no lemon' policy, the customer is entitled to turn in the defective camera and receive a new camera of the same make and model. By that time, the camera manufacturer had come out with a new model, so the camera the customer returned was priced at only $300. Denny would accept the

customers merchandise at lower prices than advertised and, with that discount, selling the customers accessories or performance service plans (similar to extended warranties). SMF ¶ 5; Declaration of Dianne Lemaux ("Lemaux Aff.") [41] ¶ 6; Deposition of Mark Arguto ("Arguto Dep.") [59] at 15-16.[39]

Although it is undisputed that Denny was caught inboarding, whether he was terminated as a result, the extent of Plaintiff's involvement in the inboarding incident, and her relationship with Denny are in dispute. According to Defendant, Janet Brown, the Human Resources Manager,[40] and Mark Arguto, the District Loss Prevention Manger, performed an investigation into the allegations, after which Brown contacted her supervisor, Regional Human Resources Manager Dianne Lemaux, to recommend terminating Denny. SMF ¶ 6; Arguto Dep. at 15; Lemaux Aff. ¶ 5. Lemaux approved Brown's recommendation and, accordingly, Brown terminated Denny's employment.[41] SMF ¶ 6; Lemaux Aff.

---

returned camera at its original selling price of $500 and 'credit' the customer with that amount; but when he gave the customer a replacement camera, he would 'charge' the customer the current selling price of $300, thus creating a 'credit' of $200. Denny would use that $200 credit to 'sell' the customer accessories and a service plan. Denny would receive credit for $200 in sales and Best Buy would lose $200 in merchandise." See Declaration of Madeleine DeLong ("DeLong Aff.") ¶ 15.

[39] This incident will be referred to herein as the "inboarding incident."

[40] Brown became the District Human Resources Manager in 2002. Brown Dep. at 12-13.

[41] According to Plaintiff, despite Denny's misconduct, Best Buy never terminated Denny. Store policy, according to Plaintiff, required that a terminated manager immediately be required to turn over his or her keys to the store, which according to Plaintiff, Denny was never ordered

¶ 5. Defendant does not expand on how Brown discovered Denny's inboarding.

According to Best Buy, after it terminated Denny's employment, Denny contacted Lemaux to inform her that, not only did Plaintiff know that Denny had been inboarding, but, in fact, Plaintiff had instructed him to do it because it would increase the store's sales numbers. SMF ¶ 7; Lemaux Aff. ¶ 6. Denny further informed Lemaux that he had been living with Plaintiff for at least four weeks.[42]

Lemaux investigated Denny's allegations. SMF ¶ 9; Lemaux Aff. ¶ 9. Because Best Buy company policy prohibited a General Manger from allowing a subordinate to live at her house, Lemaux placed Plaintiff on suspension during her investigation. SMF ¶ 9; Lemaux Aff. ¶ 9. Lemaux confirmed that Denny did, in fact, spend nights at Plaintiff's house. SMF ¶ 10; DeLong Dep. at 70-72; Lemaux Aff. ¶ 10. Lemaux believed that Plaintiff had abused her authority over Denny and had breached the requisite professional boundary between them. SMF ¶¶ 8, 10;

---

to do. Plaintiff's Statement of Material Facts as to Which There is a Genuine Issue to be Tried ("PSMF") ¶ 7; DeLong Aff. ¶ 21; Wakefield Aff. ¶ 12.

[42] Denny told Lemaux that Plaintiff originally had asked him to come to her house to help with her husband, who needed assistance because he was ill. SMF ¶ 7; Lemaux Aff. ¶ 6. Denny told Lemaux that, because Plaintiff was his supervisor and because both he and Plaintiff's husband had been former Army Rangers, he felt obligated to help Plaintiff. SMF ¶ 7; Lemaux Aff. ¶ 6. Denny further informed Lemaux that because Plaintiff was his General Manger, he felt required to do what she asked of him. SMF ¶ 7; Lemaux Aff. ¶ 6. Denny assisted Plaintiff in daily tasks and chores such as grocery shopping, yardwork, and housework. SMF ¶ 7; Lemaux Aff. ¶ 7. Denny also stated that he and Plaintiff had personal conversations about Plaintiff's marriage. SMF ¶ 7; Lemaux Aff. ¶ 7.

Lemaux Aff. ¶¶ 8, 10. Lemaux also believed that DeLong had created an environment in which employees would not feel comfortable complaining to her about Denny out of fear of retaliation from him. SMF ¶ 10; Lemaux Aff. ¶ 10. Based on her concerns regarding Plaintiff's treatment of Denny, Lemaux concluded that Best Buy should retain Denny despite his having violated Best Buy's policy against inboarding, but she decided to transfer him to a different store. SMF ¶ 11; Lemaux Aff. ¶11.

The investigation concluded on October 23, 2002. Ex. C to Defendant's Motion for Summary Judgment. On October 28, 2002, Best Buy issued Plaintiff a Performance Counseling Record ("PCR") related to the inboarding incident. Id. The PCR stated that Plaintiff had "fail[ed] to provide appropriate leadership" at her store. SMF ¶ 12; Ex. C to Def.'s Motion for Summary Judgment. The PCR provided that, if Plaintiff failed to improved her conduct, further corrective action, including termination would result. SMF ¶ 11; Ex. C to Def's Motion for Summary Judgment.

Although Plaintiff does not dispute that she received the PCR and that Denny was caught inboarding, she does dispute whether the company genuinely believed that she had engaged in improper activity. Plaintiff alleges that it was she and Richard Wakefield, an assistant manager and the Loss Prevention Manger at her store, who discovered and reported Denny's inboarding to the district office, and therefore, that she and Wakefield, and not Brown, prompted the determination to terminate Denny's employment, and that Denny's claim that she had ordered him to inboard was a false accusation made in an attempt to deflect blame from himself and keep his job. PRSMB ¶¶ 5-7; DeLong Aff. ¶ 14-19; Wakefield Aff. ¶ 9-11. Plaintiff further alleges that the documentation shows that Denny had carefully committed

all of the inboarding at times when she was not present at the store. PRSMF ¶ 5; DeLong Aff. ¶¶ 14-17; Wakefield Aff. ¶ 10-11. As for the allegations that Denny had been living with her, Plaintiff states in her Affidavit: "Denny and my husband had both been United States Army Rangers and had become friends. For that reason Denny had frequently visited our home and on one occasion 'house sat' while we were away. I had previously obtained permission from Human Resources to have store personnel visit my home." DeLong Aff. ¶ 19.

Plaintiff also argues that Wheatman, who had the authority to make disciplinary and firing determinations, protected Denny from dismissal because Denny was his friend. PRMSF ¶¶ 8-11; Wakefield ¶ 13. Moreover, according to Plaintiff, the PCR document that she received following the inboarding incident was issued against her simply as an "excuse" to retain Denny, although she cites no evidence to support this assertion. PRMSF ¶ 12.

Finally, according to Plaintiff, the company's treatment toward Denny was not in accordance with its own policies, which is a "zero tolerance" policy for stealing. PSMF ¶ 11; DeLong Aff. ¶ 20; Deposition of Dean Wheatman ("Wheatman Dep."), attached as Ex. 3 to Pl.'s Br. and as Docket Entry [55] at 125-28, 134-38; Deposition of Janet Brown, attached as Ex. 4 to Pl.'s Br. and as Docket Entries [55, 58] ("Brown Dep.") at 41.

On October 25, 2002, two days after the inboarding investigation concluded, but just before Plaintiff received the PCR, she placed a call to Best Buy's "open line" system, complaining that Dean Wheatman, the District Manger, and unnamed members of his staff, were discriminating against her on the basis of her sex. The internal form completed by

Best Buy relaying the call states: "DeLong...is calling because this is a continuation of abuses by Wheatman against her. DeLong said that she is the only female GM [General Manger], and she is treated differently than other GMs. DeLong said she...has not gotten any support from the district staff." Plaintiff's Statement of Disputed Facts ("PSMF") ¶ 40; Ex. 24 to Wheatman Dep., attached as Ex. 3 to Pl.'s BR; [55].

In a subsequent detailed report, Plaintiff stated: "My district manager singles me out from other male GM's whose performance is worse than mine, to constantly threaten my job security. [H]e and the other district members have gone behind my back in making decisions regarding this particular sales manager and now that I have brought forward information to terminate him and he makes false claims about my awareness of his actions, they are once again threatening my job security" Ex. 25 to Wheatman Dep.; PSMF ¶ 41. Plaintiff was not notified of any action on her complaint. DeLong Aff. ¶ 23.

In June of 2003, less than nine months after Plaintiff received the PCR, a second assistant manager named Scott Crossler accused plaintiff of ordering him to violate company policy in order to increase the store's sales numbers.[43] SMF ¶ 13; Lemaux Aff. ¶ 13. Crossler, who had just been terminated,[44] made this allegation to Jan Judd, the

---

[43] The events related to this incident will be referred to as the "accessories incident."

[44] According to Plaintiff, she obtained authorization to terminate Crossler in late May or early June of 2003 because a female employee alleged that she had been drugged and raped by Crossler. DeLong Aff. ¶ 3. Plaintiff alleges that Crossler's allegations against her were in retaliation for her disciplinary action against him. Pl.'s Br. at 13-14.

District Human Resources Manager for another district.[45] Declaration of Jan Judd ("Judd Aff."), attached as Ex. D to Defendant's Motion for Summary Judgment ¶ 3.

Crossler told Judd that, on November 30, 2002, Plaintiff had instructed him to purchase $1,500 worth of accessories to increase the store's sales figures for that month. SMF ¶ 14; Judd Aff. ¶ 3. Crossler informed Judd that Plaintiff had given him her Best Buy credit card number, on which to charge the accessories. SMF ¶ 14; Judd Aff. ¶ 3. Crossler then told Judd that he did, in fact, purchase the accessories at Plaintiff's direction. SMF ¶ 14; Judd Aff. ¶ 3. Finally, Crossler told Judd that Plaintiff instructed him to return the accessories in December. SMF ¶ 14; Judd Aff. ¶ 3. Judd relayed the conversation to Janet Brown, the District Human Resources Manager for District 35, which included the Savannah store where Plaintiff worked. SMF ¶ 14; Judd Aff. ¶ 4. Brown in turn contacted Brian Frantz, the District Loss Prevention Manager, who began a week-long investigation into the report. SMF ¶¶ 14-15; Deposition of Brian Frantz, attached as Ex. 5 to Pl.'s Br. and as Docket Entry [57] ("Frantz Dep.") at 23-24, 29. Frantz contacted Best Buy's central Sales Audit Group in the corporate office to request copies of documents related to the November and December transactions, which included transaction receipts and electronic journal roles. SMF ¶ 15; Frantz Dep. at 29, 35.

---

[45] The record is unclear as to how Judd became involved in the matter. Brown stated in her deposition: "I don't recall if it was because Dianne Lemaux, who was the regional human resource manager, was on vacation. She may have been acting as the regional human resource manager in Dianne's absence on that day, or it could have been that I was the district human resource manager that facilitated the termination of Scott. I don't recall which." Brown Dep. at 18.

According to Frantz, the documents showed that, in fact, a large number of accessories had been purchased on the last fiscal day of November using Plaintiff's Best Buy credit card, and then returned approximately two weeks later. SMF ¶ 16; Frantz Dep. at 31, 25. After receiving this confirmation, Frantz informed Brown and Wheatman that the documentation verified Crossler's allegations.[46] SMF ¶ 17; Frantz Dep. at 32-33. Frantz and Brown then conferred with Dean Wheatman and the three went to Savannah to question Plaintiff. SMF ¶ 17; Frantz Dep. at 33-34.

Upon arriving in Savannah, Brown contacted Dianne Lemaux, the Regional Human Resources Manager. SMF ¶ 18; Brown Dep. at 31. Brown and Lemaux discussed the documentation and accusation made by Crossler, as well as what corrective action to take against Plaintiff. SMF ¶ 18; Brown Dep. at 18, 31-32. Based on the documentation and the statements of Plaintiff's two assistant managers, Lemaux gave Brown the authority to proceed with terminating plaintiff. SMF ¶ 18; Brown Dep. at 34-35.

Frantz, Brown, and Wheatman then met with Plaintiff to discuss the transactions. SMF ¶ 20; DeLong Dep. at 129-33. At the meeting, Plaintiff admitted that she knew that the transactions had taken place, that the purchases had been made with her Best Buy credit account, and that she knew

---

[46] According to Defendant, Frantz also verified that Wakefield returned the items at Plaintiff's direction. SMF ¶ 16; Frantz Dep. at 31. There is some dispute as to when Frantz obtained this information. Brown stated in her deposition that she reported this finding to Lemaux prior to receiving authorization to terminate Plaintiff. Brown Dep. at 31-32. Frantz, however, stated in his deposition that Wakefield did not provide this information to him until the day after Plaintiff's termination. Frantz Dep. at 52-58.

they had been made to improve the store's accessory sales for the month in order to win the district banner. SMF ¶ 30; DeLong Dep. at 131; Brown Dep. at 33. Brown then informed DeLong that Best Buy was terminating her employment and presented her with a separation notice that had been prepared earlier that day. SMF ¶¶ 18, 20; Brown Dep. at 36.

Plaintiff does not dispute that an investigation took place, that Frantz verified Crossler's purchases, that the purchases were charged to her Best Buy credit card, or that the items were returned and the purchases credited to her account, but she does dispute Crossler's allegations that she orchestrated or even knew of the scheme when it was executed. PSMF ¶ 13, 14, 15, 16. Plaintiff also alleges that the trip to Savannah was exclusively to terminate her employment and that the decision was made before Wheatman, Brown, or Frantz had spoken to her. PSMF ¶ 17, 35-38, 44; Brown Dep. at 32-33, 32-34, 36; Frantz Dep. at 38.

Following her termination, Plaintiff filed a timely charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging that Best Buy had terminated her because of her sex and in retaliation for making an internal complaint of discrimination against Wheatman on the company's "open line" system. See Plaintiff's Complaint [1] ¶ 7; Answer [3] ¶ 7. It is undisputed that she received a right to sue notice from the EEOC and that she timely filed this action within ninety (90) days thereafter.

Because many of the Court's findings of fact are intertwined with its analysis of whether the parties have met

their respective evidentiary burdens, the remaining relevant facts are set forth in the Discussion below.

II. DISCUSSION

A. SUMMARY JUDGMENT STANDARD

Summary judgment is authorized when all "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that he moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the burden of demonstrating the absence of a genuine dispute as to any material fact. See Adickes v. S. H. Kress & Co., 398 U.S. 144, 175, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); Bingham, Ltd. v. United States, 724 F.2d 921, 924 (11th Cir. 1984). The movant carries this burden by showing the court that there is "an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986). In making its determination, the court must view the evidence and all factual inferences in the light most favorable to the nonmoving party.

Once the moving party has adequately supported its motion, the nonmoving party must come forward with specific facts that demonstrate the existence of a genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed.2d 538 (1986). The nonmoving party is required "to go beyond the pleadings" and to present competent evidence designating "specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324. Generally, "[t]he mere existence of a scintilla of evidence" supporting the

nonmoving party's case is insufficient to defeat a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202 (1986).

When considering motions for summary judgment, the court does not make decisions as to the merits of disputed factual issues. See Anderson, 477 U.S. at 249; Ryder Int'l Corp. v. First American Nat'l Bank, 943 F.2d 1521, 1523 (11th Cir. 1991). Rather, the court only determines whether there are genuine issues of material facts to be tried. Applicable substantive law identifies those facts that are material and those that are irrelevant. Anderson, 477 U.S. at 248. Disputed facts that do not resolve or affect the outcome of a suit will not properly preclude the entry of summary judgment. Id.

If a fact is found to be material, the court must also consider the genuineness of the alleged factual dispute. Id. An issue is not genuine if it is unsupported by evidence, or if it is created by evidence that is "merely colorable" or is "not significantly probative." Id. at 250. A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 242. Moreover, for factual issues to be genuine, they must have a real basis in the record. Matsushita, 475 U.S. at 587. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Id. at 586. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Id. at 587 (quoting First Nat'l Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289, 88 S. Ct. 1575, 20 L.Ed.2d 569 (1968)). Thus, the standard for summary judgment mirrors that for a directed verdict: "whether the evidence presents a sufficient

disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. Anderson, 477 U.S. at 259.

B. STANDARDS OF PROOF IN TITLE VII CLAIMS

Title VII of the Civil Rights Act of 1964 provides that it is unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). To prevail on a Title VII claim, a plaintiff must prove that the defendant acted with discriminatory intent. Hawkins v. Ceco Corp., 883 F.2d 977, 980-981 (11th Cir. 1989); Clark v. Huntsville City Bd. of Educ., 717 F.2d 525, 529 (11th Cir. 1983). Such discriminatory intent may be established either by direct evidence or by circumstantial evidence meeting the four-pronged test set out for Title Vii cases in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 26 L.Ed.2d 668 (1983); see also Holifield v. Reno, 115 F.3d 1555, 1561-62 (11th Cir. 1997); Nix v. WLCY Radio/Rahall Comm., 738 F.2d 1181, 1184 (11th Cir. 1984).

Direct evidence is defined as "evidence, which if believed, proves existence of fact in issue without inference or presumption." Black's Law Dictionary 413 (6th ed. 1990); see also Clark v. Coats Clark, Inc., 990 F.2d 1217, 1226 (11th Cir. 1993); Carter v. City of Miami, 870 F.2d 578, 581-81 (11th Cir. 1989); Rollins v. TechSouth, Inc., 833 F.2d 1525, 1528 FN 6 (11th Cir. 1987). Only the most blatant remarks whose intent could only be to discriminate constitute direct evidence. Clark, 990 F.2d at 1226; Carter, 870 F.2d at 581. Evidence that only suggests discrimination,

see Earley v. Champion Intern. Corp., 907 F.2d 1077, 1081-82 (11th Cir. 1990), or that is subject to more than one interpretation, see Harris v. Shelby County Bd. of Educ., 99 F.3d 1078, 1083 FN2 (11th Cir. 1996), does not constitute direct evidence. "[D]irect evidence relates to actions or statements of an employer reflecting a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee." Caban-Wheeler v. Elsea, 904 F.2d 1549, 1555 (11th Cir. 1990); see also Carter v. Three Springs Residential Treatment, 132 F.3d 635, 641 (11th Cir. 1998).

For statements of discriminatory intent to constitute direct evidence of discrimination, "they must be made by a person involved in the challenged decision," Trotter v. Board of Trustees of the Univ. of Ala., 91 F.3d 1449, 1454-54 (11th Cir. 1996), and there must be a correlation between the direct evidence and the discrimination complained of by the employee. Hill v. Metro. Atlanta Rapid Transit Auth., 841 F.2d 1533, 1539, *opinion amended on other grounds*, 848 F.2d 1522 (11th Cir. 1988).

Evidence that merely "suggests discrimination, leaving the trier of fact to infer discrimination based on the evidence" is, by definition, circumstantial. Earley v. Champion Int'l Corp., 907 F.2d 1077, 1081-82 (11th Cir. 1990). Because direct evidence of discrimination is seldom available, a plaintiff must typically rely on circumstantial evidence to prove discriminatory intent, using the framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed.2d 688 (1973), and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 1010 S. Ct. 1089, 67 L.Ed.2d 207 (1981). See Holifield v. Reno, 115 F.3d 1555, 1561-62 (11th Cir. 1997); Combs v. Plantation Patterns, 106 F.3d 1519, 1527-1528 (11th Cir. 1997). Under

this framework, a plaintiff is first required to create an inference of discriminatory intent, and thus carries the initial burden of establishing a *prima facie* case of discrimination. McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824; see also Jones v. Bessemer Carraway Medical Ctr., 137 F.3d 1306, 1310, *reh'g denied and opinion superseded in part*, 151 F.3d 1321 (11th Cir. 1998); Combs, 106 F.3d at 1527.

Demonstrating a *prima facie* case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination. Jones, 137 F.3d at 1310-1311; Holifield, 115 F.3d at 1562 (citations omitted); see Burdine, 450 U.S. at 253-54, 1010 S.Ct. at 1093-4. Once the plaintiff establishes a *prima facie* case, the defendant must "articulate some legitimate, nondiscriminatory reason" for the adverse employment action. McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824; Jones, 137 F.3d at 1310. This burden is "exceedingly light" in comparison to the burden required if the plaintiff has presented direct evidence of discrimination. Smith v. Horner, 839 F.2d 1530, 1537 (11th Cir. 1988). If the defendant is able to carry this burden and explain the rationale, the plaintiff, in order to prevail, must then show that the proffered reason is merely a pretext for discrimination. See Burdine, 450 U.S. at 253-54, 1010 S. Ct. at 1093-4; Perryman v. Johnson Products Co., 698 F.2d 1138, 1142 (11th Cir. 1983).

A plaintiff is entitled to survive a defendant's motion for summary judgment if there is sufficient evidence to demonstrate the existence of a genuine issue of material fact regarding the truth of the employer's proffered reasons for its actions. Combs, 106 F.3d at 1529. A *prima facie* case along with sufficient evidence to reject the employer's explanation is all that is needed to permit a finding of intentional discrimination. Reeves v. Sanderson Plumbing Prod., Inc.,

530 U.S. 133, 120 S.Ct. 2097, 2109 (2000); see also St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511, 113 S. Ct. 2742, 2749 (1993); Combs, 106 F.3d at 1529.

This McDonnell Douglas-Burdine proof structure "was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 103 S. Ct. 1478, 1482, 75 L. Ed.2d 403 (1983); see also Grigsby v. Reynolds Metals Co., 821 F.2d 590, 594 (11th Cir. 1987). The Eleventh Circuit has held that this framework of shifting burdens of proof is a valuable tool for analyzing evidence in cases involving alleged disparate treatment, but the framework is only a tool. Nix v. WLCY Radio/Rahall Comm., 738 F.2d 1181, 1184 (11th Cir. 1984). The "ultimate question" is not whether a plaintiff has established a *prima facie* case or demonstrated pretext, but "whether the defendant intentionally discriminated against the plaintiff." Id., 738 F.2d at 1184 (quoting Aikens, 460 U.S. at 713-14, 103 S. Ct. at 1481-82); see also Jones, 137 F.3d at 1313. The plaintiff retains the ultimate burden of proving that the defendant is guilty of intentional discrimination. Burdine, 450 U.S. at 253.

C. PLAINTIFF'S TITLE VII CLAIMS

1. Direct Evidence

Plaintiff contends that she has produced direct evidence of discriminatory intent on behalf of Best Buy. Specifically, she contends that after she was terminated, Frantz, while interviewing Rich Wakefield about the

accessories incident, told Wakefield that the only reason that Wakefield was not fired along with Plaintiff was because Wakefield "had a family to support." Pl.'s Br. at 22 (citing Wakefield Aff. ¶ 19).

As discussed above, direct evidence is defined as evidence "that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." Black's Law Dictionary 596 (8th ed. 2004); see also Clark v. Coats & Clark, Inc., 990 F.2d 1217, 1226 (11th Cir. 1993); Carter v. City of Miami, 870 F.2d 578, 581-82 (11th Cir. 1989); Rollins v. TechSouth, Inc., 833 F.2d 1525, 1528 FN 6 (11th Cir. 1987).

Best Buy does not deny that Frantz made the remark attributed to him. Instead, it argues that "[t]here is no dispute that Frantz was not a decision-maker in DeLong's termination." Defendant's Reply in Further Support of its Motion for Summary Judgment [51] ("Def.'s Reply") at 3. Plaintiff argues that Frantz, as the District Loss Prevention Manager, was a member of the team charged to investigate Crossler's allegations against Plaintiff, and thus, according to Plaintiff, "enjoyed a position of influence." Pl.'s Br. at FN 6. Plaintiff further argues that Lemaux relied, at least in part, upon Frantz's investigation in making the decision to terminate her. Id.

The evidence shows that Frantz, although he made a recommendation as to whether Plaintiff should be terminated from the company, did not view himself as a decision-maker with respect to Plaintiff's employment. According to Frantz's deposition:

Q: Did you have any input into the decision of whether Madeleine DeLong should be fired?

A: I'm going to say no, and the reason why is I made - can make recommendations. The decision was made by Janet Brown and Dianne Lemaux.

Q: Okay. And that's based on what Janet told you?

A: Based on - I'm sorry? I don't understand our question.

Q: Well, how do you know that the decision was made by them?

A: Because that's what Janet had stated to me.

Q: Okay. And - but you had input into it?

A: I made a recommendation.

Q: What was your recommendation?

A: That Madeliene be separated from the company.

Frantz Depo. at 39-40.

Thus, while Frantz was peripherally "involved in the challenged decision," Trotter, 91 F.3d at 1453-54, neither party presents evidence, or even argues, that he was a decisionmaker. Defendant's evidence suggests that Lemaux and Brown made the decision to terminate Plaintiff's employment; Plaintiff argues that, while Lemaux may have been consulted, Brown was significantly involved in Plaintiff's termination and Wheatman, who interviewed her for the initial position, was the primary decisionmaker in her

termination. See Background Facts *12-14* at 2, 13-14, Pl.'s Br. at 5-9.

Even if Frantz is considered to have been involved in the decisionmaking process, however, there is no evidence that Wheatman, Brown or Lemaux made this or any similar statement to Frantz. This statement cannot be direct evidence in the absence of proof, or even argument, that it was based on personal knowledge or observations of the decisionmakers. See Clark v. Coats & Clark, Inc., 990 F.2d 1217, 1226 (11th Cir. 1993); Rollins v. TechSouth, Inc., 833 F.2d 1525, 1526-27 (11th Cir. 1987) (remark by Plaintiff's supervisor that she did not like working with older women not direct evidence of age discrimination, even through supervisors recommended plaintiff's discharge at one time and participated in the ultimate decision to terminate her).

In addition, this comment differs from those comments in Taylor v. Runyon, 175 F.3d 861 (11th Cir. 999), or in Thompkins v. Morris Brown College, 752 F.2d 558 (11th Cir. 1985), which Plaintiff cites in support of her argument. In Taylor, the plaintiff alleged that the selecting official for a position in the defendant company told her that he was going to choose the male employee for a promotion because the male employee had a "wife" and three children and needed the money more than the plaintiff did. Id. at 867. In Thompkins, the defendant college refused to allow the plaintiff-instructor to work part-time so that she could have a second full-time job, and ultimately terminated her employment for maintaining a second job, while allowing male instructors to maintain additional full-time jobs. The president of the college-defendant stated that he saw "no reason for a woman to have a second job," and the vice president of academic affairs stated "that the reason that plaintiff could not have four classes in the afternoon like the

man was because those males had families and needs that the plaintiff did not have." Id. at 561.

In those cases, the comments addressed by the Court directly referred to the male employees' "male" status. They were in no way ambiguous. On the other hand, Frantz's comment as relayed by Wakefield makes no mention of Plaintiff's or Wakefield's gender, and addresses only Wakefield's "family" status. Thus, without other evidence and inference, it does not indicate that anyone involved in the decision exhibited a bias toward *male* employees.

Accordingly, while Frantz's comment may imply sex bias, it is not direct evidence of discrimination. Plaintiff, therefore, must rely on circumstantial evidence to prove her claims in her Complaint, that:

> (1) the termination of her employment was discriminatory, and
> (2) her termination was in retaliation for her internal complaint of gender discrimination,

and these claims must be analyzed under the McDonnell Douglas-Burdine framework.

2. McDonnell-Douglas Analysis

In order to establish a *prima facie* case of a discriminatory discharge under Title VII, Plaintiff must show that: (1) she is a member of a protected class, (2) she was qualified for the job from which she was discharged; (3) she was discharged, and (4) her former position was filled by a male. Hawkins v. Ceco Corp., 883 F.2d 977, 982 (11th Cir. 1989); see also McDonnell Douglas Corp., 411 U.S. at 802, 93 S. Ct. at 1824.

Plaintiff has produced evidence satisfying all four elements of her *prima facie* case of discriminatory discharge, and Defendant has not disputed that she was a member of a protected class, was qualified for her position, was discharged, and was replaced by a male.[47] Thus, under the McDonnell Douglas framework, the burden shifts to Defendant to produce evidence of a legitimate, non-discriminatory reason for the termination of Plaintiff's employment.

a. Defendant's Legitimate Non-Discriminatory Reason

Courts have characterized an employer's burden of producing a legitimate, non-discriminatory reason as "exceedingly light." Harris v. Fulton-DeKalb Hosp. Authority, 255 F.Supp.2d 1347, 1361 (N.D. Ga. 2002) (Thrash, J.) (citation omitted). Best Buy has presented ample evidence of a legitimate, non-discriminatory reason for Plaintiff's termination. The record reflects that, after receiving written corrective action plan in August of 2002, and then in October of 2002, having received a Performance Counseling Record, some eight to nine months later, Plaintiff was found to have violated additional company policies by instructing a store employee to purchase accessories and return them to increase sales at her store. Background Facts *supra* at 12-14. After that, the third incident within a year, she was terminated. Best Buy summarized the final reason for her termination in its Brief as follows:

> ...Best Buy made the decision to terminate DeLong after a week-long investigation by

---

[47] The evidence shows that Plaintiff was replaced by a male employee. See DeLong Aff. ¶ 37.

> Brian Frantz, the District Loss Prevention Manger, and Janet Brown, the District Human Resources Manager. Frantz and Brown obtained an admission by Scott Crossler that DeLong instructed him to violate a Best Buy rule and policy by purchasing accessories; the admission by Richard Wakefield that he had returned a portion of the accessories in December 2002 at DeLong's direction; and the verification of store records that the purchase to DeLong's credit card and return of those accessories had occurred.

See Defendant's Memorandum in Support of its Motion for Summary Judgment ("Def.'s Br.") at 14.

Accordingly, Best Buy has presented evidence of a legitimate, non-discriminatory reason for Plaintiff's termination. Under the McDonnell Douglas framework, the burden thus shifts to Plaintiff to present evidence that Best Buy's proffered reason was a mere pretext for unlawful discrimination. See Burdine, 450 U.S. at 253-54; Perryman v. Johnson Products Co., 698 F.2d 1138, 1142 (11th Cir. 1983).

b. Pretext

Plaintiff may carry her burden of showing that Best Buy's proffered reasons for her termination are pretextual by showing that they have no basis in fact, that they were not the true factors motivating the decision, or that the stated reasons were insufficient to motivate the decision. Plaintiff can either directly persuade the court that a discriminatory reason more likely motivated the employer or show indirectly that the employer's ultimate justification is not

believable. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 101 S. Ct. 1089, 1095, 67 L.Ed.2d 207 (1981) (citation omitted); Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1522 (11th Cir. 1991). In other words, the plaintiff has the opportunity to come forward with evidence, including the previously produced evidence establishing the *prima facie* case, sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision. Burdine, 450 U.S. at 256, 101 S. Ct. at 1095; McDonnell Douglas, 411 U.S. at 804, 93 S. Ct. at 1825.

Because Plaintiff bears the burden of establishing that Defendant's reasons are a pretext for discrimination, she "must present 'significantly probative' evidence on the issue to avoid judgment." Young v. General Foods Corp., 840 F.2d 825, 829 (11th Cir. 1988) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322-25, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986)).This is a more onerous burden than establishing a *prima facie* case, and "[c]onclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination where [a defendant] has offered extensive evidence of legitimate, non-discriminatory reasons for its action." Young, 840 F.2d at 830.

Plaintiff argues that each of the following constitutes evidence of pretext for unlawful discrimination: (1) that Wheatman treated her in a discriminatory manner; (3) that she was disciplined more harshly for her alleged role in the accessories incident than assistant manager Jason Denny had been for his role in the inboarding incident, and (3) that the determination that she had engaged in misconduct during the accessories incident was incorrect and was the result of a

sham investigation. Pl.'s Br. at 18-23. As discussed herein, none of these allegations, nor their sum, presents sufficient evidence of pretext to overcome Best Buy's legitimate non-discriminatory reasons for terminating Plaintiff's employment.

(1) Discriminatory Treatment by Wheatman

Plaintiff argues that Wheatman, who she alleges directly influenced the termination of her employment, subjected her to ongoing disparate treatment during her time at Best Buy. Pl.'s Br. at 18. Plaintiff alleges a laundry list of grievances against Wheatman: that he rarely visited her store; that when he did visit her store he treated her in a "demeaning and insulting manner;" that he refused to communicate with Plaintiff for extended periods of time, and that he appointed assistant managers to her store without her approval. Pl.'s Br. at 18-20. Plaintiff alleges that Wheatman did not treat male general managers in her district in the same manner. Pl.'s Br. at 19.

Because there is evidence that Wheatman was involved in the decision to terminate Plaintiff's employment, the Court will assume for the purposes of this analysis that Wheatman was a key participant, and thus, that his treatment toward Plaintiff would be relevant. The only specific instances of disparate treatment Plaintiff alleges involve Wheatman's treatment toward her at General Managers meetings and the hiring of assistant managers. Plaintiff alleges that Wheatman appointed assistant managers to Plaintiff's store without her approval or participation in the decision. Pl.'s Br. at 19; DeLong Aff. ¶ 10. Plaintiff, however, does not point to a single instance where a male General Manager in her district was given such input in the

hiring of assistant managers.[48] As for Wheatman's treatment toward her at General Manager meetings, Plaintiff does not identify any particular instance of disparate treatment, and instead relies on the following vague assertion: "At meetings of the General Mangers in the district, Wheatman ignored Ms. DeLong. He did not ignore the other General Managers at these meetings." Pl.'s Br. at 19 (citing DeLong Aff. ¶ 9).

Finally, Plaintiff herself has admitted that she has no personal knowledge of how Best Buy treated male General Managers in the district in which she worked. DeLong Dep. at 158-61. Based on this admission, and based on Plaintiff's failure to identify a similarly situated male employee treated more favorably than she was, the Court finds that Wheatman's treatment toward Plaintiff does not constitute evidence of pretext.

(2) Discriminatory Discipline

Plaintiff also argues that she was disciplined more harshly for her role in the accessories incident than Denny was for his misconduct during the inboarding incident, and that such disparate discipline is evidence that the ultimate reason given for her termination was a pretext for unlawful discrimination. Plaintiff argues: "[Denny's] offense was more severe than Crossler's (for which DeLong was blamed),

---

[48] Plaintiff alleges that "[a]t his deposition, Wheatman could not cite any instance in which he had appointed an assistant manager to a store with a male General Manager without that General Manager's approval." Pl.'s Br. at 19 (citing Wheatman Dep. at 52). Wheatman, however, stated that, "I would think I would have, but I can't right now think of a specific time. I think there might have been one in Augusta or there might have been one in Macon, Georgia." Wheatman Dep. at 52. Wheatman also stated that a store's General Manager is not always expected to play a role in the decision to appoint an assistant manager. Wheatman Dep. at 51.

since it cost Best Buy thousands of dollar, but the two offenses were at least of a similar nature. Indeed, Brown testified that the two were 'substantially identical violations of company policy.'" Pl.'s Br. at 20 (citing Brown Dep. at 45).

When a plaintiff who was disciplined by her employer attempts to establish a claim of discrimination by pointing to more favorable treatment toward other employees, the plaintiff must first identify an employee outside of her protected class to which she is "similarly situated in all relevant respects." Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997); see also Knight v. Baptist Hospital of Miami, 330 F.3d 1313, 1316 (11th Cir. 2003); Silvera v. Orange County School Bd., 244 F.3d 1253, 1259 (11th Cir. 2001). In addition, the plaintiff must point to evidence that the identified comparator committed the same or similar infractions as the plaintiff, but did not receive similar disciplinary treatment from the employer. Indeed, the plaintiff must show that the comparator's misconduct was "nearly identical" to the alleged misconduct of the plaintiff in order "to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges." Silvera, 244 F.3d at 1259 (*quoting* Maniccia v. Brown, 171 F.3d 1364, 1368-69 (11th Cir. 1999)).

Plaintiff points to Jason Denny, who, she claims, was similarly situated to herself, but who received more favorable treatment from Best Buy. Pl.'s Br. at 20. It is true that Denny engaged in misconduct within the company. Specifically, Denny was caught inboarding, which in sum, involved selling customers merchandise at lower prices than advertised, and with that discount, selling them accessories and performance service plans. See Background Facts *supra* at 5-8. And, while Best Buy alleges that it had terminated

Denny and subsequently revoked that termination, it is undisputed that Denny currently is employed at Best Buy. See Background Facts *supra* at 8. Thus, Plaintiff argues that the disciplinary action taken against him for the inboarding incident did not amount to the severity of that taken against her for the accessories incident.

A review of the evidence reveals that, while the inboarding incident and accessories incident may be comparable, Plaintiff was not similarly situated with Denny in terms of her position within the company. It is undisputed that Denny held the position of assistant manager, and thus was a subordinate of and reported to Plaintiff at the time of the inboarding incident. See Background Facts *supra* at 5-8.

Further, while the inboarding incident and the accessories incident may be comparable, see Discussion *supra* at 35, Plaintiff's argument regarding discriminatory discipline fails to take into account that she was fired not only for her alleged role in the accessories incident, but also for a previous determination that she had engaged in misconduct by instructing Denny to inboard and by allowing him to live with her. See Background Facts *supra* at 5-8. Indeed, the Court notes that Plaintiff, like Denny, was not fired following the inboarding incident, despite a determination that she had a significant role in it and had violated additional company policies. Instead, Plaintiff received a stern disciplinary warning, a PCR, for her alleged role in that incident. It was not until the company had determined that she had engaged in additional misconduct that she was terminated. There is no evidence that any other Best Buy employee, regardless of gender or rank, received a similarly strong message that he had engaged in misconduct, violated additional company policies, and was not terminated.

This case is similar to Knight v. Baptist Hosp. of Miami, Inc., 300 F.3d 1313, and Maniccia v. Brown, 171 F.3d 1364. In Knight, a terminated African-American nurse sued her employer, a hospital, alleging that her suspension and subsequent termination were discriminatory. The plaintiff argued that a similarly situated white coworker committed similar misconduct, but was not suspended. The United States District Court for the Southern District of Florida granted summary judgment for the hospital. It determined that the plaintiff could not establish a *prima facie* case of discrimination because she could not show that similarly situated employees were treated more favorably. See Knight, 330 F.3d at 1316. The Eleventh Circuit affirmed, holding that the alleged comparator was not similarly situated to the plaintiff. Id. The plaintiff's history of performance problems was substantially worse than that of her alleged white counterpart, including documented instances of a failure to follow procedure in at least five areas, compared to her coworker's single documented performance issue on a single issue. Id. at 1317-18. The Court stated:

> In the light of the entire record, Knight and Arnold are not similarly situated. Knight's documented performance and tardiness problems were much worse than Arnold's in both number and nature...Because Arnold and Knight are not similarly situated, that Arnold was not also placed on decision-making leave creates no inference of discrimination against Knight.

Knight, 330 F.3d at 1318-19.

In Maniccia, a female deputy sheriff-employee sued her county sheriff-employer, alleging that disparate treatment on the basis of sex and retaliation for her complaints were the bases for her termination. See 171 F.3d 1364. The United States District Court for the Northern District of Florida granted summary judgment for the defendant, and the Eleventh Circuit affirmed. Id. The Court held that the alleged misconduct of male employees was not sufficiently similar to the plaintiff's misconduct. Id. at 1369. While the plaintiff had committed four policy violations, including misuse of confidential information (a serious offense), the male employees each had committed only a single incident of misconduct less egregious in nature. Id.

Here, Plaintiff has failed to show that Denny - or any other male employee - was found to have engaged in misconduct, was given a stern warning, was found to have engaged in additional misconduct, and was not terminated. As a result, Best Buy's reinstatement of (or failure to terminate) Denny's employment following the inboarding incident cannot constitute sufficient evidence that Best Buy's proffered reason for Plaintiff's termination is a pretext for discrimination.

(3) Lack of Evidence and Sham Investigation

Plaintiff also argues that she never engaged in the accessories incident and that determination that she did was erroneous. When a plaintiff's employment is terminated after the determination that she had engaged in misconduct, a finding that the employee did not, in fact, engage in misconduct does not itself establish pretext. Courts are "not in the business of adjudging whether employment decisions are prudent or fair." Damon v. Fleming Supermarkets of

Florida, Inc., 196 F.2d 1181, 1187 (11th Cir. 1984). The relevant inquiry is not whether the employer's determination was correct, but whether it constitutes an "honest explanation" for terminating the plaintiff's employment. Chapman, 229 F.3d at 1030.

Here, the evidence shows that Best Buy received a complaint of misconduct, investigated it thoroughly, and made a determination based on that investigation that Plaintiff had violated company policies. See Background Facts *supra* at 5-8, 12-14. Thus, even if Best Buy was incorrect or mistaken in determining, through its investigation, that Plaintiff had violated company policy, such an error could not by itself establish pretext. See Damon v. Fleming Supermarkets of Florida, Inc., 196 F.3d 1354, 1363 FN 3 (11th Cir. 1999) ("under the 'honest belief' rule, as long as the defendant honestly believed that the plaintiff acted improperly, summary judgment should be granted for the defendant"); Robinson v. Hoover Enterprises, LLC, 2004 WL 2792057 (N.D. Ga. October 20, 2004) ("An employer's good faith, but incorrect, belief that an employee violated a work rule can constitute a non-discriminatory reason for that employee's suspension or termination").

Plaintiff, however, argues that Wheatman and Brown never believed that she had ordered Crossler to ring up the accessories and that they took advantage of Crossler's false accusation as an excuse to terminate her. Pl.'s Br. at 21-22, 23. Essentially, she argues that the investigation leading to her termination was a sham and, as a result, that it could not support an honest or reasonable belief that she had engaged in misconduct. See Pl.'s Br. a3 (citing Griffiths v. Cigna Corp., 857 F. Supp. 399, 407 (E.D. Pa. 1994)).

In support of this assertion, Plaintiff alleges the following: (1) Crossler's allegation was dubious because it occurred after DeLong allegedly had him terminated for sexual misconduct; (2) it was obvious that the "naïve and hair-brained undertaking" could only have been the idea of a subordinate; (3) Brown already believed Crossler to be a liar because he previously had given an incredible story in response to sexual misconduct charges leading to his termination; (4) the evidence concerning the transaction suggested that Crossler had acted alone; (5) Brown falsely reported to Lemaux that Crossler's accusations had been corroborated by another store manager; (6) the decision to terminate Plaintiff was made before she was informed or given the opportunity to respond to the charges; (7) the issue of whether she had participated in Crossler's scheme remained "an open question" even after her termination; (8) Brown and/or Wheatman destroyed disciplinary records in Crossler's file that would have been exculpatory to Plaintiff. Pl.'s Br. at 13-16.

Most of these assertions - the "dubious" nature of Crossler's allegation; the "naïve" and "hair-brained" character of the scheme; Crossler's credibility, and the "open question" as to Plaintiff's participation - have to do with whether Best Buy's determination was correct and not with the integrity of the investigation. As noted above, whether Plaintiff actually engaged in misconduct is irrelevant, so long as Best Buy held an honest belief that she had in making its determination to terminate her employment. See Damon v. Fleming Supermarkets of Florida, Inc., 196 F.3d at 1363 FN 3.

The remaining items - Brown's alleged false reporting; Best Buy's failure to inform Plaintiff of the allegations against her, and the alleged destruction of

evidence - involve the investigative methods used to make the determination that Plaintiff engaged in misconduct, and so the Court will address those items.

(a) Brown's False Allegation

Plaintiff argues that, in order to obtain authorization to terminate Plaintiff, Brown falsely reported to Lemaux that another store manager, Richard Wakefield, corroborated Crossler's accusations. Pl.'s Br. at 15 (citing Brown Dep. at 31-32). Specifically, Brown stated in her deposition:

> [W]e had the allegation from Scott Cros[]ler, which implicated Madeleine in the situation. The credit card information came back, and it was confirmed that it was Madeleine's credit card that was used to make the purchases.
>
> Richard Wakefield was -- Brian spoke to Rich Wakefield, and he admitted that Madeleine had asked h[im] to return these products back to her car[d] because they were trying to win a banner, and they didn't. ...And then from there once we had all of the facts and the information, I partnered with Dianne Lemaux, the regional human resource manager, with the information that we had seeking confirmation and direction on what steps should be taken.

Brown Dep. at 21.

According to Plaintiff, however, Wakefield was not interviewed until the day after Plaintiff was terminated and, at that time, provided information confirming that Plaintiff was "innocent." Pl.'s Br. at 15 (citing Frantz Dep. at 50-52). Plaintiff and Wakefield, however, have admitted that Plaintiff instructed Wakefield to return the accessories and that Wakefield did as she requested. DeLong Dep. at 120-21, 139-40; Wakefield Aff. ¶ 16 ("Ms. Delong asked me [to] make certain that Crosler returned all of the accessories he had charged, and I did so."). Further, the documentary evidence showed now only that Plaintiff's card was used to make the acquisitions, but that the accessories were returned. Frantz Dep. at 29, 31, 35. While there is some debate over when Wakefield made a statement verifying that he had returned the accessories, and while he may have defended Plaintiff to Frantz, these circumstances are immaterial considering Plaintiff's and Wakefield's own admissions and the documentary evidence. The Court finds, therefore, that the timing of Wakefield's statement is not a question of material fact on the issue of pretext.

(b) Notice of the Charges Against Her

Plaintiff next argues that the decision to terminate her was made before she was informed of the accusations against her, and that she was never given an opportunity to answer those charges. Pl.'s Br. at 15 (citing Brown Dep. at 32-33).

Prior to their meeting with Plaintiff, Frantz, Wheatman, and Brown had been presented with an accusation from Crossler that Plaintiff had instructed Crossler to purchase the accessories. They also knew from their investigation that the accessories had been charged to Plaintiff's credit card, and that the purchases later were

credited to Plaintiff's account, which Plaintiff confirmed at their meeting and has admitted in her own deposition and affidavit. Brown Dep. at 33; DeLong Dep. at 120-21, 139-40; DeLong Aff. ¶¶ 30-32. Brown discussed the documentary evidence and accusations with Lemaux prior to meeting with Plaintiff, and, on the basis of the facts presented, was given authority (but not mandated) to terminate Plaintiff's employment.

Plaintiff has made no allegation that, at the meeting, she denied any knowledge of or involvement in the accessories incident, and in her own affidavit, admits that the only information she provided at the meeting involved whether she was aware that Crossler had bought accessories using her charge account. DeLong Aff. ¶ 35 ("When Brown, Wheatman, and Frantz met with me in Savannah to ask me about the accessories charges, the only question they asked me was whether, at the time of the interview, I was aware that Cros[]ler had bought accessories using my charge account. They never asked me whether Crossler had acted at my instructions or with my knowledge. I truthfully answered the one question they asked, by stating that, at the time of the interview, I was aware of what Cros[]ler had done. At no time did I 'admit' having had any participation in, or knowledge of, his actions when he undertook them."). Plaintiff gave no new information at the meeting, and thus, the fact that the Regional Human Resources Director, Lemaux, who was out-of-state and did not attend the meeting with Plaintiff, Lemaux Aff. ¶ 2, authorized the termination prior to Plaintiff's interview does not show pretext; it only evidences the manner in which senior management exercised its input in the decision.

(c) Destroyed documents

> Last, Plaintiff argues that:
> Brown and/or Wheatman destroyed documentary proof of DeLong's innocence by removing all disciplinary records from Crossler's personnel file. These records include the reprimand that DeLong had submitted on Crossler, reprimanding him for charging the accessories to his account. Brown and Wheatman had no explanation for how Crossler's file could have been systematically stripped of its disciplinary records (with hiring records intact).

Pl.'s Br. at 16 (citing Brown Dep. at 62-66, 68-70, 75).

Plaintiff, however, cites no direct evidence supporting the assertion that Brown or Wheatman destroyed documents except Brown's deposition, which does not include an admission of destruction, and instead states the following:

> As a general manager, as Scott's general manager, Madeleine had that opportunity to document him for performance-related issues and may have not gotten those documents to me to put in his file. There could have been documents that she may still have had in her possession or at the store location in Savannah that may never have come to us. That's possible as well.

Brown Dep. at 75.

In short, Plaintiff has presented no direct evidence of spoliation, and her unsupported allegation is not sufficient evidence of pretext to raise a question of material fact. Nor is it sufficient when combined with her remaining evidence of pretext, the Frantz comment to Wakefield, that Wakefield was spared only because he had a family to support. Even when considered in their totality, Plaintiff's evidence of pretext creates only a "weak issue of fact" when compared to Defendant's "abundant and uncontroverted independent evidence that no discrimination occurred." Reeves v. Sanderson Plumbing Prods., 120 S. Ct. 2097, 2109 (2000). In Reeves, the Supreme Court said:

> Certainly there will be instances where, although the plaintiff has established a *prima facie* case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination occurred.

Id.

Accordingly, the Court **RECOMMENDS** that Plaintiff's discriminatory discharge claim, Count I of her Complaint, be **DISMISSED.**[49]

---

[49] Plaintiff also argues that she has presented sufficient evidence to invoked a "mixed motive" analysis, that is, even if her misconduct were

3. Retaliation

Title VII acts to shield employees from retaliation for certain protected practices. Specifically, the statute provides, in relevant part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment...because [the employee or applicant] has opposed any practice made an unlawful practice by this subchapter, or because he has made a charge, testified,

---

one factor leading to her termination, then evidence of a discriminatory or retaliatory animus would permit a fact finder to conclude that both the proper motive and the improper motive led to the termination of her employment. Pl.'s Br. at 23-24 (citing Desert Palace v. Costa, 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003)).

The mere raising of circumstantial evidence is not by itself adequate to establish an inference of discrimination, even in a mixed motive case. The circumstantial evidence must be sufficient to conclude that an impermissible motive led to the adverse decision. See, e.g., Desert Palace, 539 U.S. 90 (noting that a defendant's uncredible explanation for an employment practice is "one form of circumstantial evidence that is probative of intentional discrimination." (quoting Reeves, 530 U.S. at 147). Although Plaintiff has raised some weak evidence of discrimination, she has failed to raise a genuine issue of material fact as to whether Defendant held an honest belief that she had engaged in misconduct when it terminated her employment, or that some improper motive influenced her terminations. See Discussion *supra* at 31-49. If there is no genuine issue of material fact supporting Plaintiff's claim that this belief was the motivating factor in the termination of her employment, then there is no factual issue as to whether it was a motivating factor so as to allow a mixed motive case to go forward. If there were an issue of fact as to whether discrimination was a factor, then the Court would necessarily conclude that there was evidence from which a reasonable jury could find discrimination to be the factor.

> assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). Plaintiff has alleged that Defendant retaliated against her by terminating her after she complained of gender discrimination using the company's "open line" complaint system. Pl.'s Br. at 5; Background Facts *supra* at 10.

Proof of retaliation is governed by the same framework of shifting evidentiary burdens established in McDonnell Douglas and Burdine. Donnellon v. Freuhauf Corp., 794 F.2d 598, 600 (11th Cir. 1986); see also Goldsmith v. City of Atmore, 996 F.2d 1155, 1162-63 (11th Cir. 1993). In order to prevail, a plaintiff must first establish a *prima facie* case of retaliation. Goldsmith, 996 F.2d at 1162-63; Donnellon, 794 F.2d at 600-601; see also Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1524 (11th Cir. 1991) (footnote omitted); Simmons v. Camden County Bd. of Educ., 757 F.2d 1187, 1189 (11th Cir. 1985). Once a *prima facie* case has been established, the employer must come forward with a legitimate non-discriminatory reason for its action. Goldsmith, 996 F.2d at 1162-63; Donnellon, 794 F.2d at 600-601; see also Weaver, 922 F.2d at 1525-1526. If the employer carries its burden of production to show a legitimate reason for its action, the plaintiff then bears the burden of proving by a preponderance of the evidence that the reason offered by the defendant is merely a pretext for discrimination. Goldsmith, 996 F.2d at 1162-63; Donnellon, 794 F.2d at 600-601.

a. *Prima Facie* Case

To establish a *prima facie* case of illegal retaliation under 42 U.S.C. § 2000e-3(a), Plaintiff must show that: (1) she engaged in statutorily protected expression; (2) she received an adverse employment action, and (3) there was a causal link between the protected expression and the adverse action. See, e.g., Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1454 (11th Cir. 1998); Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1524 (11th Cir. 1991) (footnote admitted); Simmons v. Camden County Bd. of Educ., 757 F.2d 1187, 1189 (11th Cir. 1985).

Defendant does not appear to dispute that Plaintiff engaged in protected activity by using the "open line" complaint system to complain of gender discrimination. Def.'s Br. at 23. And, as Plaintiff was terminated, then there is no dispute that an adverse employment action was taken against her. For the third element of her *prima facie* case of retaliation, Plaintiff must establish that there is a causal link between her protected activity and the adverse employment action. Plaintiff is not required to establish "the sort of logical connection that would justify a prescription that the protected participation in fact prompted adverse action. Such a connection would rise to the level of direct evidence of discrimination, shifting the burden of persuasion to the defendant." Simmons v. Camden County Bd. of Educ., 757 F.2d 1187, 1189 (11th Cir. 1985); see also Hairiston v. Gainesville Sun Pub. Co., 9 F.3d 913, 920 (11th Cir. 1993); Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1525 (11th Cir. 1991). Rather, Plaintiff can satisfy the third element merely by presenting evidence that her protected activities and the subsequent adverse employment actions are not totally unrelated. Simmons, 757 F.2d at 1189; see also Hairiston, 9 F.3d at 920; Weaver, 922 F.2d at 1525.

In order to establish a causal connection between protected conduct and an adverse employment action, however, "[a]t a minimum, a plaintiff must generally establish that the employer was actually aware of the protected expression at the time it took the adverse employment action." Goldsmith v. City of Atmore, 996 F.2d 1155, 1163 (11th Cir. 1993); see also Weaver, 922 F.2d at 1525. The defendant's awareness of the protected statement, however, may be established by circumstantial evidence. Goldsmith, 966 F.2d at 1163 (citations omitted).

Plaintiff argues that Wheatman and Brown, as decisionmakers in the termination of her employment, harbored a retaliatory animus against her for lodging the "open line" complaint against Wheatman. The evidence shows that Plaintiff made her initial complaint of discrimination on the "open line" system on October 25, 2002. Ex. 24 to Wheatman Dep.; Wheatman Dep. at 142-43. The Ethics and Compliance Reporting form completed by Best Buy stated:

> DeLong ... is calling because this is a continuation of abuses by Wheatman against her. DeLong said she is the only female GM, and she is treated differently [than] other GM[]s. DeLong said she ... has not gotten any support from the district staff.

Ex. 24 to Wheatman Dep.; PSMF ¶ 40. Subsequently, Plaintiff submitted a detailed written statement:

> My district manager singles me out from other male GM[]s whose performance is worse than mine, to constantly threaten my job security. [H]e and the other district

> members have gone behind my back in making decisions regarding this particular sales manager and now that I have brought forward information to terminate him and he makes false claims about my awareness of his actions, they are once again threatening my job security.

Ex. 25 to Wheatman Dep. There is also evidence that Wheatman was aware of the complaint against him at the time that it was made. Wheatman Dep. at 141-42.

While Defendant argues that neither Wheatman nor Brown was a decisionmaker in the termination of Plaintiff's employment, there is evidence that both Wheatman and Brown played roles in the decision. According to Best Buy company policy as relayed to the EEOC, "[a]fter investigation the decision is discussed and proposed by the individual's direct supervisors and a recommendation made to Human Resources. Human Resources must give final approval on all terminations." Ex. 9 to Pl.'s Br. at BBC 158. Further, Frantz stated in his deposition that, at one point during the investigation, he and Brown "partnered" with Wheatman in the investigation, because, as the district manager, Wheatman was "responsible...for the general managers within the district." Frantz Dep. at 32. Finally, Brown stated in her own deposition that Wheatman could have input into termination decisions, Brown Dep. at 36, and that Dianne Lemaux gave both her and Frantz the authority to terminate Plaintiff's employment. Brown Dep. at 35.

Viewing the evidence in the light most favorable to Plaintiff, the Court finds that there is evidence that both Wheatman and Brown had influential roles into the decision to terminate Plaintiff's employment. The relevant issue thus

is whether their roles in the decision to terminate her employment in July of 2003 were causally connected to Plaintiff's "open line" complaint in October of 2002.

(1) Retaliatory Motivations of Brown and Wheatman

In support of her assertion that Brown approved Plaintiff's termination, Plaintiff alleges: (1) that Brown obtained authority to terminate Plaintiff before Plaintiff was apprised of the allegations against her; (2) that Brown falsely claimed to Lemaux that she had obtained a statement from Wakefield corroborating Crossler's allegations, and (3) that Brown concealed from Frantz the fact that Crossler made his accusation to Plaintiff after she had recommended that he be terminated for sexual harassment. Pl.'s Br. at 7. There is no evidence that Brown knew of the "open line" complaint, and Plaintiff has presented no connection between any of these allegations with respect to Brown's motive and her "open line" complaint except for the conclusory assertion that these events "reeked of retaliatory motive" on the part of Brown. Id.

Similarly, in her Brief, Plaintiff has provided no evidence of a connection between the "open line" complaint and Wheatman's role in her termination, other than the unsupported assertion that "[i]mmediately following the complaint, Wheatman's already inappropriate treatment dramatically worsened and he subjected her to increasingly hostile conduct; he was disdainful, condescending, and routinely threatened her job." Pl.'s Br. at 9. This statement, without any citations to the record or specific examples, is insufficient to establish a causal connection.

In her PSMF, however, Plaintiff alleges that, following her "open line" Complaint, Wheatman stopped communicating with her; would frequently threaten her job when they did speak; did not visit her store for four months, and refused to recognize Plaintiff's successes. PMSF ¶¶ 43-46 (citing Delong Aff. ¶¶ 24-27; Wakefield Aff. ¶ 7). Since her "open line" complaint alleged similar behavior prior to her complaint, Wheatman's actions after Plaintiff's complaint evidence only a continuation of the previously identified "misconduct." Because his conduct did not change following Plaintiff's protected activity, there is no evidence that his participation in a decision to terminate her was connected to the "open line" complaint.

Thus, the only evidence that Plaintiff has of retaliation is the proximity in time between her complaint and the decision to terminate her. As a matter of law, however, the eight to nine months that passed between Plaintiff's protected activity and her termination is too great to create a question of material facts as to whether the two events were causally connected. See, e.g., Higdon v. Jackson, 393 F.3d 1211 (11th Cir. 2004) (gap of three months between protected expression and adverse employment action not sufficient to establish temporal proximity in retaliation claim under Americans with Disabilities Act, which is analytically similar to Title VII).

b. Defendant's Legitimate Non-Discriminatory Reason

Even assuming that Plaintiff could present a *prima facie* case of retaliation, as discussed above, Best Buy has presented ample evidence of a legitimate, non-discriminatory reason for Plaintiff's termination. The record reflects that Plaintiff was terminated from Best Buy based on the

determination that she had violated company policy through her involvement in the accessories incident, after the previous determination that she had engaged in serious misconduct. See Discussion *supra* at 12-14. Thus, the burden shifts to Plaintiff to show that this reason was a pretext for unlawful retaliation.

c. Pretext

Plaintiff relies on the same evidence of pretext in her retaliation claim that she does in support of her gender discrimination claim. See Pl.'s Br. at 13-22. In sum, she states that "these facts show not only that Crossler's allegations were unworthy of belief, but provide the jury with substantial evidence from which to conclude that the decisionmakers never believed them" when making the decision to terminate her employment. Pl.'s Br. at 16.

For the reasons stated above, the Court finds that Plaintiff has failed to rebut Defendant's articulated legitimate reasons for terminating her employment. See Discussion *supra* at 31-49. Accordingly, the Court finds that Plaintiff has not shown that Best Buy's proffered reason for terminating her employment was a pretext for retaliation. Therefore, Plaintiff's claim of retaliation fails. Accordingly, the Court **RECOMMENDS** that Plaintiff's Title VII retaliation claim, Count II of her Complaint, be **DISMISSED.**

III. RECOMMENDATION

For all the above reasons, **IT IS RECOMMENDED** that Defendant's Motion for Summary Judgment [40] be **GRANTED.**

IT IS SO RECOMMENDED this 13th day of December, 2005.

/s/ C. Christopher Hagy
C. CHRISTOPHER HAGY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 06-11853-JJ

MADELEINE DELONG,

Plaintiff-Appellant,

versus

BEST BUY COMPANY INC.,

Defendant-Appellee.

On Appeal from the United States District for the
Northern District of Georgia

Filed U.S. Court of Appeals Eleventh Circuit
March 12, 2007 – Thomas Kahn, Clerk

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: ANDERSON, BLACK and BARKETT, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ R. L. Anderson
UNITED STATES CIRCUIT JUDGE

ORD-42

(2/05)

(2)

No. 06-1644

FILED
AUG 13 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

MADELEINE DELONG,
Petitioner,

v.

BEST BUY COMPANY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

ELLIOT S. KAPLAN *
ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015
(612) 349-8500

* Counsel of Record

Counsel for Respondent
Best Buy Company, Inc.

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

The only question actually presented by the Eleventh Circuit's unpublished decision, which assumed *arguendo* the presence of adequate evidence for the causation element of a prima facie case of Title VII retaliation, and which did not address any "cat's paw" issue or the question of a company's liability under an agency-law analysis for subordinates' acts, is whether the court erred in its case-specific, summary conclusion that the plaintiff lacked sufficient evidence to defeat summary judgment and proceed to trial on the issue of whether the employer's legitimate explanation for the plaintiff's discharge was a pretext for illegal retaliation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT	1
ARGUMENT	7
CONCLUSION	10

TABLE OF AUTHORITIES

CASES Page

BCI Coca-Cola Bottling Co. v. EEOC, 127 S. Ct. 852, 1931 (2007) 7, 9, 10

United States v. Curtis, 380 F.3d 1308 (11th Cir. 2004), *modified in other respect*, 400 F.3d 1334 (11th Cir.), *cert. denied*, 126 S. Ct. 418 (2005) 8

STATUTES

42 U.S.C. § 2000e *et seq.* 1

IN THE

Supreme Court of the United States

No. 06-1644

MADELEINE DELONG,

Petitioner,

v.

BEST BUY COMPANY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

This is a garden-variety, Title VII employment case in which the Eleventh Circuit Court of Appeals, in an unpublished decision, held that petitioner lacked sufficient evidence to show that the employer's reason for her discharge (evidence of participation in dishonest sales transactions) was a pretext for illegal retaliation, a showing that the plaintiff (petitioner) below accepted as legally required of a claim of retaliatory discharge under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The court of appeals drew only that narrow, factbound conclusion and did not render—and was not timely asked to render—any ruling on the broader legal issue that petitioner now seeks to inject into the case.

1. In the trial court petitioner unsuccessfully made allegations of both sex discrimination and retaliation. She appealed only on the retaliation claim. The facts involve her firing after several disciplinary warnings and following Best Buy's receipt of objective documentary evidence that she had been involved in a dishonest scheme to inflate the end-of-month sales numbers of the store she managed.[1]

Petitioner was the General Manager of a Best Buy store in Savannah, Georgia. After several years in that position, she was made the subject of a corrective action plan in August, 2002, as the result of multiple complaints received about a negative working environment in that store. Pet. App. 12a-13a.[2]

In October, 2002, one of the assistant managers in petitioner's store was discovered to be "inboarding," *i.e.*, selling merchandise at a discount in order to add accessories and extended warranties to the transaction. When Best Buy fired that employee, he reported to the company that petitioner not only knew of the "inboarding" but had directed him to engage in the conduct to increase the store's sales numbers. This employee also reported that he had stayed at petitioner's house on occasion and that she had asked him to help her take care of her husband under circumstances in which he found it difficult to refuse. After investigating, the company's Regional Human Resources Manager concluded that petitioner had abused her authority, breached professional boundaries between her and the employee, and created an environment where other employees would be fearful of raising concerns

---

[1] Pursuant to this Court's Rule 29.6, respondent Best Buy Company, Inc., (registered name Best Buy Co., Inc.) states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

[2] The cited pages of the Magistrate's report and recommendation (Pet. App. 11a-57a) reference the record evidence supporting the fact statement here.

about the assistant manager because of his non-business relationship with petitioner. As a result, Best Buy rescinded the assistant manager's discharge and issued petitioner a written warning citing her failure to provide appropriate leadership. Pet. App. 14a-17a.

Two days after the investigation into the "inboarding" incident was concluded, but three days before the written warning was issued to her, petitioner made a telephone complaint to the company's "open line" regarding what she called sex discrimination by her supervisor, District Manager Dean Wheatman, and other, unnamed, members of his district staff. Among other things, petitioner complained (in the telephone call and a follow-up submission) that Mr. Wheatman and other district staff had inappropriately gone behind her back in making decisions about the assistant manager who accused her of being involved in the "inboarding." Pet. App. 18a-19a.

In June, 2003, about eight months after the warning to petitioner, a second assistant manager accused her of improperly manipulating end-of-month sales figures in her store. Specifically, the assistant manager said that petitioner had instructed him to purchase $1,500 in accessories on the last day of November, 2002, using her credit card, for the purpose of inflating the end-of-month sales figures for her store, and, then, to return the items in December. This assistant manager made these allegations after being discharged because of alleged inappropriate sexual conduct with another employee. The District Human Resources Manager, Janet Brown, passed the assistant manager's allegations along to the District Loss Prevention Manager, Brian Frantz, for investigation. Pet. App. 19a-20a.

Mr. Frantz investigated the allegations. He contacted corporate offices in Minnesota and obtained documentation, including receipts and electronic journal rolls, relating to transactions in the store in November and December, 2002. These documents confirmed the purchase of large numbers

of accessories on petitioner's credit card on the last day of November, 2002. The documents also confirmed that the items purchased were returned in December. Mr. Frantz reported to Ms. Brown and Mr. Wheatman that the documents verified the allegations made by the assistant manager. Pet. App. 20a-21a.

Following Mr. Frantz's report, Ms. Brown, Mr. Wheatman, and Mr. Frantz traveled to Savannah to meet with petitioner. Before the meeting, Ms. Brown phoned Diane Lemaux, her immediate supervisor and the company's Regional Human Resources Manager, and discussed the information compiled by Mr. Frantz and the accusation made by the assistant manager (whom petitioner does not accuse of acting out of retaliation for her sex discrimination grievance) about petitioner's involvement in the improper transactions. Ms. Lemaux then gave Ms. Brown the authority to terminate petitioner's employment. Pet. App. 21a.

In her meeting with the company representatives in Savannah, petitioner acknowledged that she was aware that the accessories were purchased by her assistant manager using her credit card and that the purchases were made to improve the store's sales figures. Pet. App. 21a-22a. Petitioner did not, during this meeting, offer any additional information or explanation for the transactions. Pet. App. 46a. Ms. Brown then told petitioner that Best Buy was terminating her employment. Pet. App. 22a.

2. When petitioner brought suit under Title VII, she alleged that she was the victim of sex discrimination and that she had been fired in retaliation for making a sex-discrimination complaint eight months earlier. The latter allegation is the only one that she pursued on appeal and pursues here. As to that allegation, petitioner accepted the legal framework under which she had to make out a prima facie case of a causal link between protected expression and her discharge and, if Best Buy advanced a legitimate reason for the dis-

charge, had to present evidence sufficient to show that reason to be pretextual. Pet. App. 50a-51a; D 47, Plaintiff's Brief in Opposition to Motion for Summary Judgment, pp. 3-4.

The Magistrate to whom the case was assigned granted Best Buy summary judgment. Applying the legal framework accepted by petitioner, the Magistrate not only rejected all of petitioner's sex-discrimination allegations (Pet. App. 28a-48a), which are not at issue here, but also rejected her retaliation allegation (Pet. App. 49a-56a). Regarding retaliation, the Magistrate first concluded that petitioner lacked sufficient evidence of the required causation between her October 2002 "open line" complaint and her June 2003 discharge. Pet. App. 51a-55a. The Magistrate then concluded that, in any event, "Best Buy has presented ample evidence of a legitimate, non-discriminatory reason for Plaintiff's termination," namely that "she had violated company policy through her involvement in the accessories incident, after the previous determination that she had engaged in serious misconduct," and that petitioner lacked sufficient evidence to show that reason to be pretextual. Pet. App. 55a-56a; and 33a-48a.

Significantly, the Magistrate's report and recommendation contains no ruling on the issue petitioner now seeks to inject into the case. In particular, the Magistrate did not determine that subordinates had acted out of illegal retaliatory motives but that liability was avoided because a non-biased decision-maker actually made an innocent (non-retaliatory, or even non-discriminatory) decision despite the flawed information provided by the biased subordinates. Indeed, the Magistrate assumed that Ms. Brown and Mr. Wheatman (the two subordinates petitioner accuses of having retaliatory motives) *were* involved in the decision to terminate (Pet. App. 53a) and simply found that petitioner had insufficient evidence of a discriminatory or retaliatory motive affecting the discharge decision given the amply documented proffered legitimate reasons (Pet. App. 36a-47a, 56a) and that there was insuf-

ficient evidence of a causal connection between petitioner's October 2002 grievance and her June 2003 discharge (Pet. App. 54a-55a).

The district court subsequently approved and adopted the Magistrate's report and recommendation, thus granting summary judgment. Pet. App. 8a.

3. In the court of appeals, petitioner raised only her retaliation claim. On that claim, moreover, petitioner fully accepted the legal framework applied by the Magistrate, under which, even if there were adequate evidence of causation for the prima facie case, the plaintiff loses if the employer advances a legitimate reason for the discharge and the plaintiff lacks adequate evidence that the reason is pretextual. Nowhere in petitioner's opening or reply briefs did she question that framework or—what the Petition now features—present the arguments or authorities, founded in causation or agency principles, about employer responsibility for subordinates' discrimination-tainted influence in superior's decisions (the "cat's paw" idea, *see* Pet. 9). Rather, petitioner merely disputed the case-specific conclusions about causation and pretext. *See* CA Brief of Appellant at 15-27; CA Reply Brief of Appellant at 8-12.

In a per curiam unpublished decision, the court of appeals (Anderson, Black, Barkett, JJ.) affirmed the district court's grant of summary judgment based on the Magistrate's report and recommendation, deciding only the pretext issue. After expressing some doubt about whether the eight-month lapse of time between the "open line" complaint and the discharge was too great to support the causal link required by the prima facie case, the court said that it need not decide the causation question. Pet. App. 5a. Instead, it "assume[d], for the sake of argument, that DeLong can make out a prima facie case of retaliation." *Id.* On that assumption, the court affirmed the summary judgment on the ground that petitioner lacked sufficient evidence for a reasonable juror to find that Best

Buy's plainly legitimate reason for discharging her was pretextual. Pet. App. 6a-7a. "DeLong has not shown that Best Buy did not honestly believe, following an investigation into the allegations against her, that she had on two separate occasions engaged in activities that violated the store's policies." Pet. App. 7a.

Petitioner sought rehearing, for the first time invoking the "cat's paw" principle. CA Rehearing Pet. at 10-13. The court denied rehearing. Pet. App. 58a-59a.

ARGUMENT

The ruling of the Eleventh Circuit does not warrant review. It is unpublished and hence non-precedential. And it simply does not involve a ruling on the issue that petitioner seeks to inject into this case—the causation and agency standards for employer liability for adverse actions that may be based on discriminatory acts of subordinates.

The petition rests entirely on an effort to capitalize on this Court's recent interest in that issue. *See BCI Coca-Cola Bottling Co. v. EEOC*, 127 S. Ct. 852, 1931 (2007) (granting then dismissing petition). But the attempt to insert that issue into this case must fail. The Eleventh Circuit did not rule on that issue, and indeed petitioner did not timely present such an issue to the Eleventh Circuit. The ruling below, instead, is a garden-variety, fact-specific decision about the sufficiency of evidence on the pretext element of a retaliation claim, an element whose legal necessity petitioner fully accepted in the court of appeals. This case is accordingly the wrong case for this Court to pursue the issue on which it granted certiorari in the *BCI* case.

The *BCI* "cat's paw" issue involves the causation and agency components of Title VII liability. *See* Brief for EEOC in *BCI* at 16; Brief for Petitioner in *BCI* at 19-20; Brief *Amicus Curiae* for U.S. Chamber of Commerce in *BCI* at 6.

There is no ruling on the cat's paw issue, or the causation or agency components of Title VII liability, in the Eleventh Circuit decision. In fact, the Eleventh Circuit expressly said that it was not deciding even the generic causation question petitioner presented, and it said nothing at all about agency or the "cat's paw" line of authority. The sole ruling by the Eleventh Circuit concerned the sufficiency of evidence of pretext.

The explanation for this limited ruling is not hard to find. Neither petitioner's opening brief nor her reply brief in the court of appeals made any argument about the "cat's paw" theory or line of authority. Those briefs cited none of the precedents, from the Eleventh Circuit or elsewhere, on which the petition now relies. Rather, petitioner fully accepted the legal framework of the Magistrate's decision, including the requirement that she present sufficient evidence to show Best Buy's explanation for her discharge to be pretextual, and simply argued about the particular evidence she had. Not until losing before the panel did petitioner raise a "cat's paw" issue, in her rehearing petition, which is too late. *See, e.g.*, *United States v. Curtis*, 380 F.3d 1308, 1309 (11th Cir. 2004) (reciting longstanding rule that issues not raised in merits briefs, but only on rehearing, are waived), *modified in other respect*, 400 F.3d 1334 (11th Cir.), *cert. denied*, 126 S. Ct. 418 (2005). Petitioner, in short, is trying to inject into this case an issue that not only was not ruled on below but that she did not preserve below.

The Eleventh Circuit, in its only ruling in this case, applied the law governing pretext that petitioner herself accepted—the need for a plaintiff, even after making out a prima facie case, to present sufficient evidence (under the usual summary judgment standards) that the employer's proffered explanation for the adverse action was a pretext for retaliation. And the Eleventh Circuit did no more than decide the wholly case-specific question whether petitioner had presented such

evidence. That is not a ruling on the *BCI* issue that is petitioner's sole question presented. And, being both unpublished and summary in content, it is of no precedential importance.

Like the Eleventh Circuit ruling, the Magistrate's report and recommendation (adopted by the district court) did not involve a claim by petitioner under a "cat's paw" theory—namely, that a non-biased superior is alleged to have made an adverse employment decision based on information supplied by biased, but non-decisionmaking, subordinates. In her opposition to Best Buy's motion for summary judgment in the trial court, petitioner instead argued that the evidence showed that the "decisionmakers" were Ms. Brown and Mr. Wheatman, whom she alleged were motivated by discriminatory and retaliatory motives and never believed that petitioner was actively involved in the improper purchase of accessories using her credit card. Pet. App. 42a, 52a. The Magistrate's report and recommendation assumed that Ms. Brown and Mr. Wheatman were involved in the decision to terminate petitioner (Pet. App. 53a) and analyzed the sufficiency of petitioner's evidence regarding the conduct of these individuals. The Magistrate found that there simply was insufficient evidence, as a matter of accepted law, to determine that the company's explanation for the decision made by these individuals was a pretext for either discrimination or retaliation. Pet. App. 36a-47a, 54a-55a. It was that evidence-specific determination, not involving a "cat's paw" ruling, that the Eleventh Circuit affirmed in concluding that petitioner "has not shown that Best Buy did not honestly believe, following an investigation into the allegations against her, that she had on two separate occasions engaged in activities that violated the store's policies." Pet. App. 7a.

In short, the Eleventh Circuit's decision does not present a "cat's paw" ruling or even a "cat's paw" scenario as presented by petitioner, let alone a "cat's paw" argument timely

made by petitioner in either lower court. This case, accordingly, is not an appropriate one in which to return to the *BCI* issue of the amount of involvement a biased underling must have in a decision made by a non-biased superior before the employer may properly be found liable under agency principles.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ELLIOT S. KAPLAN *
ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015
(612) 349-8500

* Counsel of Record

Counsel for Respondent
Best Buy Company, Inc.

(3)

No. 06-1644

FILED
AUG 28 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

MADELEINE DELONG,
PETITIONER

v.

BEST BUY COMPANY, INC.
RESPONDENT

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

DANIEL M. KLEIN
Counsel of Record
JOHN F. BEASLEY, JR.
BUCKLEY & KLEIN, LLP
1180 West Peachtree Street
Atlantic Center Plaza, Ste 1100
Atlanta, Georgia 30309
(404) 781-1100

Counsel for Petitioner
Madeleine DeLong

TABLE OF CONTENTS

Page

Argument in Reply 1

A. The "Cat's Paw" Argument Has Always Been Central to Plaintiff's Case 1

B. This Court's Authority to Rule Is Not Compromised By The Circuit Court's Failure to Directly Address The Cat's Paw Theory 5

Conclusion 6

TABLE OF CITED AUTHORITIES

Page

CASES:

Booth v. Hume Publishing, Inc., 902 F.2d 925 (11th Cir. 2000) 4

Buckley v. Hosp. corp. of America, Inc., 758 F.2d 1525 (11th Cir. 1985) 3

Garrett v. Hewlett-Packard Co., 779 F.3d 1210 (10th Cir. 2002) 4

Haas v. ADVO Sys., Inc., 168 F.3d 732 (5th Cir. 1999) 2

Jalal v. Columbia Univ. in New York, 4 F.Supp2d 224 (S.D.N.Y. 1998) 2

Lathem v. Dept. of Children and Youth Services, 172 F.3d 786 (11th Cir. 1999) 4

Lattimore v. Oman Const., 868 F.2d 437 (11th Cir. 2000) 4

McQueeny v. Wilmington Trust Co., 779 F.2d 916 (3rd Cir. 1985) 4

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000) 2, 3

Russell v. McKinney Hosp. Venture, 235 F.3d 219 (5th Cir. 2000) 1, 2

United Brotherhood of Carpenters and Joiners of America v. United States, 330 U.S. 395, 412 (1947) 5

United States v. Southern Fabricating Company,
764 F.2d 780 (11th Cir. 1985).....4

Warren v. Prejean, 301 F.3d 893 (8th Cir. 2002).....4

ARGUMENT IN REPLY

Respondent's opposition to certiorari rests not so much on the fact that Petitioner lost her job due to the influences of biased subordinates – a classic "cat's paw" scenario – but instead on the supposition that the cat's paw theory was not raised in the briefing process nor addressed by the Eleventh Circuit other than in its cursory denial of en banc consideration. This argument fails for two reasons. First, although the phrase "cat's paw" was not included in the early appellate briefing on this case, Petitioner put the issue before both the district and appellate courts. Petitioner has consistently attributed her termination to the retaliatory influences of District Manager Dean Wheatman and District Human Resources Manager Janet Brown under a cat's paw theory, first raising the issue in summary judgment briefing. Second, the Eleventh Circuit's failure to address subordinate bias liability by use of the words "cat's paw," when its ruling is on all fours with a strict and, according to Petitioner, inappropriate application of the theory does not rob this Court of the opportunity to consider proper application of the theory.

A. The "Cat's Paw" Argument Has Always Been Central to Plaintiff's Case

Setting aside for the moment the fact that Petitioner directly addressed the cat's paw theory of liability in seeking reconsideration of the Eleventh Circuit's opinion (CA Rehearing Pet. at 10-13), it is clear that the issue has always been present although not expressly stated. In *Russell v. McKinney Hosp. Venture*, 235 F.3d 219 (5th Cir. 2000), the Fifth Circuit articulated the cat's paw theory as contemplating factual circumstances in which "the evidence indicates that the worker possessed leverage, or exerted

influence, over the titular decisionmaker." *Id.* at 227. In her summary judgment brief Petitioner argued exactly that:

> Where decisions are made by a group, an individual is considered "involved in the decision" if he is a member of the group *or is in a position to influence the group.* Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) (age-biased comments by one member of a three-member committee raised an inference of discrimination). Evidence of improper motive "by a biased committee member may raise a rational inference that bias impermissibly affected the committee's decision." Jalal v. Columbia Univ. in New York, 4 F.Supp.2d 224, 239 (S.D.N.Y. 1998). *Bias by those who are not even part of the ultimate decision making process, but are factually in a position to influence it, also raise an inference of discrimination.* Haas v. ADVO Sys., Inc., 168 F.3d 732 (5th Cir. 1999). Thus, under established law, a challenged decision is illegal if any participant is shown to have had a discriminatory or retaliato y motive. Wheatman had one. Brown had one.

D47 at 10 (emphasis added). Similarly, in her opening appellate brief, Petitioner argued that:

> Extensive evidence suggested that Brown and Wheatman took advantage of this, their first opportunity to retaliate against DeLong for her accusations of discrimination eight months earlier, and that they deliberately conducted a

> crooked 'investigation' *for the purpose of engineering her termination.*

CA Brief of Appellant at 10 (emphasis added). As Petitioner argued, the termination was engineered by false reports to the "final" decisionmaker, Human Resources Manager Diane Lemaux. *Id.* at 10-11.

In her appellate brief, Petitioner also pointed out the errors of the District Court despite its finding "that Wheatman and Brown 'played *influential roles* in the decision to terminate Plaintiff's employment'" and that "Best Buy did not object to [the] findings." *Id.* at 17 (emphasis and brackets added, record citations omitted). Petitioner highlighted her point by underscoring the fact that "[i]n order to get the approval she needed to fire DeLong, Brown falsely reported to Lemaux that Crossler's accusations had been corroborated" and that "Brown hid . . . information from her superiors." *Id.* at 19. In the end, both the District Court and the Court of Appeals focused on the Respondent's "honest belief" (Pet. Appx. at 43a and 7a) instead of the inherent factual issues that surrounded the biased representations of subordinates Brown and Wheatman, factual issues that the District Court acknowledged but improperly found were "weak." Pet. Appx. at 48a.[1]

---

[1] To say that the Eleventh Circuit considered Brown and Wheatman among the decisionmakers would be to assume it ignored substantial authority suggesting that their conduct was sufficient to create a question of fact worthy of the denial of summary judgment. *See Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. 133, 147 (2000)("the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt'"); *Buckley v. Hosp. Corp. of America, Inc.*, 758 F.2d 1525, 1530 (11th Cir. 1985)(failure to interview key witnesses can indicate

Petitioner did not ask the Eleventh Circuit panel to re-evaluate the Eleventh Circuit standard for "cat's paw" liability, something the panel would have had no authority to do. She plainly, however, laid the facts before the District Court and the Eleventh Circuit panel and, at least in the district court, cited authority for why the bias of Brown and Wheatman should be imputed to Lemaux. Even if she had not, the Eleventh Circuit was free to consider it. *See Booth v. Hume Publishing, Inc.*, 902 F.2d 925, 928 (11th Cir. 2000)("Although as a general rule an appellate court will not consider a legal issue or theory raised for the first time on appeal ..., we have discretion to do so if the new issue or theory "involves a pure question of law, and if refusal to consider it would result in a miscarriage of justice.")(quoting *Lattimore v. Oman Const.*, 868 F.2d 437, 439 (11th Cir.1989)(quoting *United States v. Southern Fabricating Company*, 764 F.2d 780, 781 (11th Cir.1985))). Accordingly, Petitioner's request for rehearing cannot be discounted as evidence in consideration of her preservation efforts. In any event, the Eleventh Circuit's failure to address the issue does not rob this Court of the right to do so where the result is plain error.

---

discriminatory intent); *Lathem v. Dept. of Children and Youth Services*, 172 F.3d 786 (11th Cir. 1999); *see also*; *McQueeny v. Wilmington Trust Co.* , 779 F.2d 916, 921-22 (3d. Cir. 1985); *Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1217 (10th Cir. 2002); *Warren v. Prejean*, 301 F.3d 893, 903 (8th Cir. 2002).

B. This Court's Authority To Rule Is Not Compromised By The Circuit Court's Failure to Directly Address The Cat's Paw Theory

By ruling that Petitioner failed to show that Respondent did not honestly believe in her violations of policy (Pet. Appx. at 7a), the Eleventh Circuit applied its existing cat's paw analysis, consistent with the Fourth Circuit and contrary to the Fifth, Seventh and Tenth Circuits, that an employer's knowledge and motivation is limited to that possessed by the "ultimate" decisionmaker. After the Eleventh Circuit issued its opinion, Petitioner sought reconsideration or rehearing en banc and specifically pointed out the cat's paw issue, citing it by name. CA Rehearing Pet. At 10-13. Still, her arguments were rejected. Pet. Appx. at 58a-59a.

Thus, it is the Circuit Court and not Petitioner that failed to address the cat's paw theory by name. Nonetheless, even if it were to be determined that Petitioner did not fully preserve the issue for appeal, this Court retains "the power to notice a 'plain error' though it is not assigned or specified." *United Brotherhood of Carpenters and Joiners of America v. United States*, 330 U.S. 395, 412 (1947). Even if the issue had not been raised below at all, the decision reflected the application of Eleventh Circuit authority at odds with all other circuits except the Fourth. Petitioner urges the Court to issue the writ for the purpose of resolving the split in authority and correcting the Eleventh and Fourth Circuits' erroneous interpretation of the law.

CONCLUSION

For the reasons cited above and in the Petition, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

Daniel M. Klein
Counsel of Record
John F. Beasley, Jr.
BUCKLEY & KLEIN, LLP
1180 West Peachtree Street
Suite 1100
Atlanta, Georgia 30309
Telephone: (404) 781-1100

Counsel for Petitioner
Madeleine DeLong